DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-7387
Title: Monroe Ace Setser, Petitioner
v
United States
Docketed: November 8, 2010
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (08-10835)
Decision Date: May 11, 2010
Rehearing Denied: August 5, 2010
Questions Presented:

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 2 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 8, 2010)
Dec 1 2010	Order extending time to file response to petition to and including January 7, 2011.
Jan 4 2011	Order further extending time to file response to petition to and including February 11, 2011.
Feb 11 2011	Brief of respondent United States in opposition filed.
Feb 24 2011	DISTRIBUTED for Conference of March 18, 2011.
Mar 14 2011	Reply of petitioner Monroe Ace Setser filed. (Distributed)
May 25 2011	DISTRIBUTED for Conference of June 9, 2011.
Jun 13 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 15 2011	Evan A. Young, Esquire, of Austin, Texas, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Jul 13 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 12, 2011.
Jul 13 2011	The time to file the brief of amicus curiae in support of the judgment below is extended to and including September 26, 2011.
Aug 11 2011	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including August 19, 2011.
Aug 11 2011	The time to file respondent's brief on the merits is further extended to and including October 11, 2011.
Aug 19 2011	Brief of respondent the United States supporting petitioner filed.
Aug 19 2011	Joint appendix filed. (Statement of costs filed)
Aug 19 2011	Brief of petitioner Monroe Ace Setser filed.
Aug 19 2011	Motion for leave to file volume II of the joint appendix under seal filed by petitioner Monroe Ace Setser.

Sep 12 2011	SET FOR ARGUMENT ON Wednesday November 30, 2011
Sep 14 2011	CIRCULATED
Oct 3 2011	Motion for leave to file volume II of the joint appendix under seal GRANTED
Oct 11 2011	Brief amicus curiae of Court-appointed amicus curiae in support of the judgment below filed. (Distributed)
Oct 14 2011	Motion for divided argument filed by the Solicitor General
Oct 28 2011	Motion for divided argument filed by the Solicitor General GRANTED
Nov 10 2011	Reply of respondent United States filed. (Distributed)
Nov 10 2011	Reply of petitioner Monroe Ace Setser filed. (Distributed)
Nov 30 2011	Argued. For petitioner: Jason D. Hawkins, Assistant Federal Public Defender, Dallas, Tex. For respondent in support of petitioner: William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For amicus curiae in support of the judgment below: Evan A. Young, Austin, Tex. (Appointed by this Court.)
Mar 28 2012	Adjudged to be AFFIRMED. Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas Alito, Sotomayor, and Kagan, JJ., joined. Breyer, J., filed a dissenting opinion, in which Kennedy and Ginsburg, JJ., joined.

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PETITION FOR WRIT OF CERTIORARI

No. 10-_____

In the
Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does a district court have authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence?

II

Is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?

PARTIES TO THE PROCEEDING

Petitioner is Monroe Ace Setser, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monroe Ace Setser respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Setser*, 607 F.3d 128 (5th Cir. 2010). The slip opinion is reprinted in the Appendix to this Petition. Pet. app. 1a–8a. The district court's sentencing decision was issued orally, but a copy of the judgment is reprinted in the Appendix. Pet. app. 10a.

JURISDICTION

The court of appeals entered judgment on May 11, 2010. Pet. app. 1a. Petitioner filed a timely request for rehearing *en banc*, which was denied on August 5, 2010. Pet. app. 9a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 3584(a) provides, in relevant part:

> **Imposition of concurrent or consecutive terms.**--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

INTRODUCTION

This petition presents the opportunity to resolve a persistent and pernicious circuit split over whether a federal district judge has the authority to order a sentence to run consecutive to an anticipated, but as-yet-unimposed state sentence. The Government has acknowledged that the courts of appeals are divided, four to four, over this question, and has conceded that the court below has reached the wrong conclusion.

The Government has previously opposed review in this Court, however, by arguing that it would be more prudent to allow the court below to correct its error through *en banc* proceedings. That is no longer a realistic possibility; the court below announced in a published decision that it would not take up the issue *en banc* and that it would await correction by this Court. Pet app. 5a, n.**. In a separate case, the court denied another request for *en banc* hearing even after the Government joined the petition and asked the court to overrule its offending precedent. *See* Order Denying Rehearing, *United States v. Vargas-Solis*, No. 09-50240 (5th Cir. July 7, 2010), *pet. for cert. filed*, No. 10-6866 (U.S. pet. filed Oct. 5, 2010). Only this Court can resolve the split and correct the erroneous law of the Fifth Circuit. The Court should therefore grant the petition and reverse the decision below.

STATEMENT

On October 1, 2007, Lubbock police officers arrested Petitioner after finding suspected narcotics during a traffic stop. At the time he was arrested,

Petitioner was serving a five-year term of probation stemming from a previous state conviction (the "2006 state case").[1] State authorities subsequently charged Petitioner with possession of a controlled substance with intent to deliver in the state court arising from the activities of October 1, 2007 (the "2007 state case"). They also filed a motion to revoke his probation in the 2006 state case.

Before the state cases could be resolved, the federal government stepped in and charged Petitioner for his activities on October 1, 2007 with three offenses: (1) possession with intent to distribute at least 50 grams of methamphetamine (count one); (2) possession of a firearm in furtherance of a drug trafficking crime (count two); and (3) convicted felon in possession of a firearm (count three). The United States Attorney's Office then issued a writ to bring Petitioner into federal custody. Petitioner pleaded guilty to count one of the indictment and in exchange the Government agreed to dismiss the remaining two counts.

At sentencing, the federal district court sentenced Petitioner to 151 months of imprisonment and ordered the sentence to run consecutive to whatever sentence might be imposed in the pending state case the 2006 state case, and concurrent to whatever sentence might be imposed in the 2007 state case. Pet. app. 12a. Neither case had been resolved in state court. The district court relied upon *United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir. 1991),

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[1] *State v. Setser*, No. 2006-412,543 (137th Dist. Ct. Lubbock Co., Tex. March 6, 2007).

abrogated on other grounds by United States v. Candia, 454 F.3d 468, 472–73 (5th Cir. 2006), which held that a federal court does have authority to order a sentence to run consecutive to an anticipated but as-yet-unimposed state sentence.

After the federal judgment was entered, the state court entered convictions in the 2007 state case and revoked probation in the 2006 state case. The state court sentenced Petitioner to five years incarceration on the 2006 state case, and ten years on the 2007 state case. The state court directed that the sentences run concurrently. Pet. app. 15a–19a.[2]

Petitioner appealed his federal sentence and argued that the district court had exceeded its statutory authority in ordering that his federal sentence run consecutively to a state sentence that had yet to be imposed. Petitioner acknowledged that Fifth Circuit precedent foreclosed this claim, but sought to preserve the issue for *en banc* review or for certiorari in this Court. Alternatively, Petitioner argued that entry of the consecutive term rendered the resulting sentence unreasonable, as it was impossible for BOP to fully effectuate the judgment as written.

The court of appeals affirmed the district court in a published decision. Pet. app. 1a–8a. The court acknowledged the conflict of authority, but stated

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[2] On March 31, 2009, the court of appeals granted Petitioner's motion to supplement the record on appeal to include the state court conviction documents.

that "any future reversal of [the Fifth Circuit's] decision in *Brown* is best left to the discretion of our Supreme Court." Pet. app. at 5a, n.**.

REASONS FOR GRANTING THE PETITION

This case demonstrates that chaos and confusion result from allowing a district court to order that a federal sentence run consecutive to a yet-to-be-imposed state sentence. As it stands, the federal judgment orders BOP both to grant Petitioner credit against his federal sentence for each day he spent in state custody, and to *not* grant him credit for each day he spent in state custody. The court of appeals's holding perpetuates an entrenched, four-to-four circuit conflict that the Government has acknowledged, and it affirms a sentencing practice that the Government has conceded is unlawful. The arguments the Government has made against review in other cases presenting this issue provide no reason to deny review in this case. This Court should therefore grant the petition and stop this unlawful practice.

I. THE COURT OF APPEALS'S DECISION PERPETUATES AN ACKNOWLEDGED CONFLICT AMONG THE CIRCUITS AND AFFIRMS A SENTENCING PRACTICE THE GOVERNMENT ADMITS IS UNLAWFUL.

As the Government has acknowledged, the courts of appeals are divided, 4-4, over whether a federal district court has authority to order a federal sentence to be served consecutively to a state sentence that has yet to be imposed. *See, e.g.*, Br. in Opp., *Smith v. United States*, No. 08-8118, at 21–22 (filed Apr. 29, 2009) ("*Smith* Opp.") (describing split). The Second, Sixth,

Seventh, and Ninth Circuits have all held that a district court lacks the authority to issue such a sentence. *See United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (per curiam); *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991). In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has such authority. *See Brown*, 920 F.2d at 1216; *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir.), *cert. denied*, 516 U.S. 926 (1995); *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993).

The Government has conceded, moreover, that "Section 3584(a) does not confer th[e] authority" to "direct that a sentence be served consecutively to a yet-to-be-imposed state sentence." *Smith* Opp. at 20-21. Indeed, the text of 18 U.S.C. § 3584(a) makes clear that a district court is authorized to impose a consecutive sentence in two, and only two, circumstances: (1) "[i]f multiple terms of imprisonment are imposed on a defendant *at the same time*," or (2) "if a term of imprisonment is imposed on a defendant who is *already subj*[illegible] an undischarged term of imprisonment." 18 U.S.C. § 3584(a) (emphasis added). As the Government has acknowledged, to hold that a district court also has authority to order a federal sentence consecutive to a state sentence that has not yet been imposed would render a large portion of Section 3584(a) surplusage.

Smith Opp. at 22. Furthermore, as the Government has conceded, a district court "cannot logically" "consider the sentencing factors set out in 18 U.S.C. 3553(a) in making a decision whether to impose a term of imprisonment consecutively or concurrently to another term" when "one of [those] sentences has not yet been determined." *Smith* Opp. at 23. Thus, the sentence imposed by the district court in this case is indisputably unlawful.

II. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW PROVIDE NO BASIS FOR DENYING THE PETITION IN THIS CASE.

The Government concedes that a district court has no authority to order a federal sentence to run consecutive to an as-yet-unimposed state sentence, but has resisted review in various cases which have presented the issue to this Court. The Government has offered two reasons for its opposition. First, it has argued that the unlawful sentencing practice does not have any significant impact on criminal defendants. *See Smith* Opp. at 23, 28; Br. in Opp., *Cortes-Beltran v. United States*, No. 08-8243, at 21 (filed Apr. 13, 2009) (same). Second, it has argued that the circuits that currently sanction illegal consecutive sentences might reconsider their view in light of the Government's confession of error. This case demonstrates the flaws in both of those arguments.

A. Petitioner's unlawful sentence prevents the Bureau of Prisons from granting him credit for time he spent in state custody.

Under Bureau of Prisons ("BOP") regulations, federal prisoners have the ability to request credit for time they previously served in state custody. BOP "has the authority to implement a concurrent sentence by retroactively designating the state prison in which the defendant served his state sentence as the place for service of his federal sentence as well." *United States v. Garcia-Espinoza*, 325 F. App'x 380, 382 (5th Cir. 2009) (unpub.) (Owen, J., concurring); *accord*, Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction* 4, available at http://www.bop.gov/news/ifss.pdf (last accessed Nov. 1, 2010).

In the absence of a controlling district court order, Petitioner could ask the BOP to retroactively designate the facility where he served out his 2007 state case sentence for service of his federal sentence. *See Barden v. Keohane*, 921 F.2d 476, 478 (3d Cir. 1990) (remanding case to BOP for consideration of prisoner's requrest for *nunc pro tunc* designation). BOP has codified the procedures for *nunc pro tunc* designation requests. *See* BOP, *Designation of State Institution for Service of Federal Sentence*, Program Statement 5160.05 (Jan. 16, 2003), available at http://www.bop.gov/policy/progstat/5160_005.pdf (last accessed Nov. 1, 2010).

If, however, a district court has exercised its purported authority under

18 U.S.C. § 3584, then BOP has no statutory or inherent authority to reject that order. The BOP honors its role *vis-a-vis* the district court through its program statement: "The Bureau will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service of sentence (e.g., the federal sentencing court ordered the sentence to run consecutively to any other sentence." BOP Program Statement 5160.05 at 6–7, § 9.b.(4)(f). Thus, the district court's unlawful order stands between Petitioner and any credit (through retroactive designation) for the time he spent in state custody.

The possibility of a retroactive designation is not so remote at to justify denial of review, particularly where the Government has conceded that the district court order itself is unlawful. The time for which Petitioner would seek credit—namely, the time he spent in state custody between the date his federal sentence was issued and the date he was released from primary state custody—was served for the very same offense conduct (the 2007 state case) underlying his instant federal conviction. He was also sentenced to custody on an unrelated revocation matter (the 2006 state case), but his parole eligibility and the length of time he served in state custody was logically dictated by the longer sentence imposed in the related 2007 state case. Where the district court is silent, BOP basis its retroactive designation decision on a number of factors, including "inmate discipline history," "institutional adjustment," and the "recommendations of the Wardens at the state and federal institutions." BOP

Program Statement 5160.05 at 4, § 8.a (referenced in *id.* at 6, § 9.b.(4)(e)). Of course, an attack on the federal judgment would not provide a proper vehicle to litigate that administrative issue. But under the same reasoning, the direct appeal of the unlawful term of the judgment provides Petitioner's only avenue for relief against an unlawful term of the judgment itself.

Here, the district court prevented Petitioner from pursuing the remedy of retroactive designation when it entered an unlawful order that the federal sentence be served consecutive to the as-yet-unimposed sentence in the 2006 state case. Thus, the unlawful order has a palpable effect on Petitioner, and on all similarly-situated defendants. This Court's review is therefore warranted.

B. The Fifth Circuit will not reconsider its precedent.

The Government has also argued that this Court should not intervene because the Fifth Circuit may reverse its precedent. For example, in August of 2009, the Government argued that review in this Court would be "premature" because, in the Government's view,

> the conflict over the interpretation of Section 3584(a) is best suited to resolution in the lower courts. Indeed, the courts of appeals that disagree with the government's interpretation (and petitioner's), including the court below, have begun to reconsider that stance. The government has taken active steps both to encourage that re-examination in the courts of appeals and to oppose consecutive-sentencing orders in the district courts.

Brief in Opp. 12, *Brockman v. United States*, No. 08-1427 (filed Aug. 25, 2009) ("*Brockman* Opp."). In the present case, however, the Fifth Circuit announced in a published decision that it would not reconsider or overrule *Brown* unless it

was ordered to do so by this Court: "[G]iven this Court's recent refusal to reconsider *Brown* en banc, any future reversal of the Court's decision in *Brown* is best left to the discretion of our Supreme Court." Pet. app. 5a, n.**. And consistent with that announcement, the Fifth Circuit denied requests for hearing or rehearing en banc in the present case and at least two others. Pet. app. 9a–10a; *see* Order Denying Petition for Hearing En Banc, *United States v. Garcia*, No. 09-10797 (5th Cir. filed Oct. 18, 2010); Order Denying Rehearing, *Vargas-Solis*, No. 09-50240. In *United States v. Vargas-Solis*, the government actually joined the petition for rehearing en banc, but as anticipated by the panel opinion in the present case, the court below awaits correction from "our Supreme Court." Pet. app. 5a, n.**.

The time to end this practice is now, and this is the case in which to do so. The arguments advanced by the Government against review in previous cases carry no weight here: Petitioner has properly preserved the issue for plenary review, and the harm caused by his unlawful sentence is demonstrable. This Court should grant the petition and resolve this conflict once and for all.

III. THE SENTENCE HERE ILLUSTRATES THE ABSURDITY THAT CAN RESULT FROM JUDICIAL ATTEMPTS TO PREEMPTIVELY DICTATE THE INTERACTION AMONG SEPARATE-SOVEREIGN SENTENCES WHEN SOME SENTENCES DO NOT YET EXIST.

As stated previously, the BOP has the authority and the ability to make a federal sentence fully or partially concurrent with a state sentence. Where the offender first spends time in state custody, the BOP effectuates a concurrent

order by designating the state facility for service of the federal sentence. Even where service of the state sentence is completed, the BOP can retroactively grant credit by entering a *nunc pro tunc* designation of the state sentence. When the district court exercises its authority under 18 U.S.C. § 3584(a), then BOP is required to effectuate that order.

Here, the district court ordered the federal sentence to run *consecutive to* the 2006 state case, but *concurrent with* the 2007 state case. Pet. app. 12a. The trouble is, the state court ordered those two sentences to run concurrent with each other. Pet. app. 15a ("This sentence shall run concurrent.") Each day that Petitioner spent in state custody was, in some sense, served on the 2006 state case and also served on the 2007 state case. Thus, for each day beginning with the entry of the federal sentence and ending with Petitioner's release from state custody, the BOP is required both to retroactively designate the state facility for service of the federal sentence (to effectuate the concurrent order), and to *not* designate that facility (to effectuate the consecutive order).

The court below was unperturbed by this dilemma. The court implicitly acknowledged that the federal judgment's terms were "irreconcilab[le]" with the subsequently-issued state sentences, and that in this case, the federal sentence would be "partially foiled." Pet. app. 7a (quoting *United States v. Cibrian*, 374 F. App'x 524 (5th Cir. Mar. 14, 2010) (unpub.)). In the Fifth Circuit's view, any ambiguity or frustration was the result of the state court sentences. Pet. app. 7a. But it was the district court who created the possibility for irreconcilability and

frustration when it chose to enter consecutive and concurrent orders despite its ignorance of the length of the anticipated state sentences. The decision should not be inoculated against reasonableness review merely because the *possibility* of frustration created by the federal court's unlawful order *actually came to fruition* when the state court entered its sentences.

On this point, Petitioner agrees with the Government's argument in *Brockman*:

> 18 U.S.C. 3584(b) . . . directs federal courts to consider the sentencing factors set out in 18 U.S.C. § 3553(a) in deciding whether to impose concurrent or consecutive terms of imprisonment. Several of those factors involve consideration of the total length of incarceration, *see, e.g.*, 18 U.S.C. 3553(a)(2)(B), (2)(C) and (6), and that analysis cannot logically take place when one of the defendant's sentences has not yet been determined.

Brockman Opp. at 7 n.3. It is foolhardy to expect district courts to consider "the total length of incarceration" when ignorant of yet-future components of the aggregate sentence. Where, as here, the appellate court has learned of the subsequently-issued sentences, there is no reason to ignore those facts under reasonableness review merely because the district court did not know them. That's the whole point. The district court should not be permitted to engage in this unreasonable and unlawful sentencing practice. If a court does make that kind of order, it should be upon pain of reversal in the event that the subsequently-issued state sentences render the previously issued federal sentence unreasonable.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(214) 767-2746

November 2, 2010

No. 10-____

In the Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PROOF OF SERVICE

I, JASON D. HAWKINS, do swear or declare that on this date, November 2, 2010, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other document required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Neal Katyal
Acting Solicitor General of the United States
Room 5614, Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

and by electronic mail today to the Office of the Solicitor General at SupremeCtBriefs@USDOJ.gov.

James Wesley Hendrix
Assistant United States Attorney
United States Attorneys Office
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

I further certify that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2010.

JASON D. HAWKINS
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No. 10-_____

In the Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner, Monroe Ace Setser, asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this November 2, 2010.

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Petition Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
May 11, 2010

Lyle W. Cayce
Clerk

No. 08-10835

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MONROE ACE SETSER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:

Defendant-Appellant Monroe Ace Setser appeals the district court's imposition of a federal sentence that runs consecutively to an undischarged state sentence. Because the imposition of a consecutive sentence is fully within the district court's authority, and because we conclude that the sentence is otherwise reasonable and not illegal, we find no error in the district court's sentencing of defendant. Accordingly, we AFFIRM.

I. BACKGROUND

Monroe Ace Setser pleaded guilty to possession with intent to distribute 50 grams or more of methamphetamine and aiding and abetting. At the time he committed the instant offense, Setser was still serving a five-year term of

probation in state court for a previous 2006 state offense. Additionally in 2007, Setser had been charged in state court with possession with intent to deliver a controlled substance—an offense that was directly related to the instant federal offense of conviction.

Following Setser's entry of a guilty plea, the federal district court sentenced Setser to 151 months of imprisonment. At the time of sentencing, the district court stated that the 151 months were to be served consecutively to any sentence imposed as a result of his 2006 state offense and concurrently with any sentence imposed pursuant to his 2007 state offense. Setser timely appealed his sentence, arguing that the district court's sentence was illegal since 18 U.S.C. § 3584 does not grant the district court the authority to impose a federal sentence consecutively to an undischarged state sentence.

Subsequent to the district court's imposition of the federal sentence, Setser's probation in his 2006 state case was revoked by the state court, and he was sentenced to five years of imprisonment. Additionally, Setser was convicted of possession with intent to deliver a controlled substance in the 2007 state charge, and as a result, he was sentenced to ten years of imprisonment. The state court ordered that these two state sentences would run concurrently to one another.

On April 12, 2010, the United States moved pursuant to Fed. R. App. P. 10(e)(2)(C) & (e)(3) to supplement the record with documents showing that the Texas prison system released Setser and that he is now in the custody of the federal Bureau of Prisons ("BOP"). Consequently, after serving only two-and-a-half years in the state system on both of his 2006 and 2007 state sentences, Setser is now in BOP custody. Setser's Texas parole documents show

that he was released from state custody on March 17, 2010. The BOP's "Public Information Inmate Data" sheet indicates that Setser's federal sentence began to run on March 17, 2010. The BOP did not award Setser any credit for the two-and-a-half years he spent in state custody.

II. STANDARD OF REVIEW

"A sentence is ultimately reviewed for 'unreasonableness.'" *United States v. Candia*, 454 F.3d 468, 472 (5th Cir. 2006) (quoting *United States v. Smith*, 440 F.3d 704, 705 (5th Cir. 2006)). "Under *Booker*, it is the sentence itself, including its consecutive nature, that is ultimately reviewed for reasonableness." *Id.* at 472-73 (quoting *United States v. Booker*, 543 U.S. 220, 261 (2005)). Here, where the Defendant-Appellant is only challenging the imposition of a consecutive sentence, and not the district court's application or calculation of the Guidelines themselves, "the appellate court should . . . consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also Candia*, 454 F.3d at 474 ("We have determined that unreasonableness is the standard of review applicable to a consecutive sentence imposed both within a properly calculated sentencing range and pursuant to the applicable guidelines for imposition of a consecutive sentence."). Accordingly, this Court reviews the reasonableness of the district court's imposition of a consecutive sentence for abuse of discretion.

III. ANALYSIS

On appeal, Setser contends that the district court erred by relying on 18 U.S.C. § 3584 as authority to order his sentence to run consecutively to his undischarged state sentence in his 2006 state conviction. He acknowledges that this argument is foreclosed by the Court's decision in *United States v. Brown*,

920 F.2d 1212, 1216 (5th Cir. 1991), *abrogated on other grounds by Candia*, 454 F.3d at 472-73, where this Court held that "[w]hether a sentence imposed should run consecutively or concurrently [to an undischarged state sentence] is committed to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a)."

Setser offers several arguments as to why this Court should now revisit its decision in *Brown*. First, Setser notes that the circuits are split on this issue,* and he contends that *Brown* does not comport with the text of 18 U.S.C. § 3584 or its legislative history. Finally, Setser contends that the sentencing factors in

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* The Eleventh, Eighth, Tenth, and Fifth Circuits have held that § 3584 authorizes district courts to order a federal sentence to run consecutively to an undischarged state sentence. *See United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993) ("[A] district court [has] the authority to impose a federal sentence consecutive to an unrelated, unimposed state sentence on pending charges."); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) ("[T]he authority to impose such a federal sentence to be served consecutively to a yet-to-be-imposed state sentence falls within the broad discretion granted to the court."); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995) (holding that "no language in section 3584(a) prohibit[s] a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed."); *United States v. Brown*, 920 F.2d 39 1212, 1216 (5th Cir. 1991) (holding that "whether a sentence imposed should run consecutively or concurrently is committed to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a)."). In contrast, the Second, Fourth, Seventh, Sixth, and Ninth Circuits have held that a federal district court does not have such discretion or authority. *Cf. United States v. Donoso*, 521 F.3d 144, 147 (2d Cir. 2008) (determining "that under 18 U.S.C. § 3584(a), the district court was not authorized to direct that the federal sentence run consecutively to [an undischarged] state sentence."); *United States v. Smith*, 472 F.3d 222, 225 (4th Cir. 2006) ("The plain language of this statute does not grant a district court authority to order that its sentence run consecutively to a future sentence."); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000) ("Neither § 3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his sentence must run consecutively to some sentence that may be imposed in the future."); *United States v. Quintero*, 157 F.3d 1038, 1039-40 (6th Cir. 1998) ("We hold that 18 U.S.C. § 3584(a) does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence."); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991) (holding "[t]hat a federal court may not direct a federal sentence to be served consecutive to a state sentence not yet imposed . . . .").

§ 3553(a) and U.S.S.G. § 5G1.3 run contrary to *Brown*, as do considerations of comity.

Even if we were to find Setser's arguments compelling, we are bound by *Brown*'s precedent as "[i]t is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision." *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). Thus, there are only two ways in which *Brown*'s posture as binding precedent in this Court could change: 1) an intervening decision by the Supreme Court or 2) a superseding decision by this Court sitting en banc. The Supreme Court, to date, has issued no intervening decision. Further, this Court has recently declined the opportunity to reconsider *Brown* en banc.** Because *Brown* is the law of this Court, we conclude that the district court had the authority to–and therefore did not abuse its discretion by—imposing a consecutive federal sentence to a yet imposed state sentence.

Despite the district court's authority to issue a consecutive sentence, Setser argues that his consecutive sentence is unreasonable because he asserts that his federal sentence is now logically impossible to carry out—as a result of

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** In *United States v. Garcia-Espinoza*, No. 08-10775, 2009 WL 1362199 at *1 (5th Cir. May 15, 2009) (unpublished), this Court rejected a defendant's challenge to his consecutive sentence, holding that his "challenge is foreclosed by our prior precedent." However, in light of the circuit split concerning a district court's discretion to order a federal sentence to run consecutively to an undischarged state sentence, Judge Owen and Judge Dennis, in their joint concurrence, recommended that the Court revisit the *Brown* holding en banc. *Id.* at *2. Yet when Garcia-Espinoza filed a motion for rehearing en banc, "[n]o member of the panel nor judge in regular active service on the court . . . requested that the court be polled" on a rehearing en banc. As a result, the Court denied the defendant-appellant's motion on April 13, 2009. Thus, given this Court's recent refusal to reconsider *Brown* en banc, any future reversal of the Court's decision in *Brown* is best left to the discretion of our Supreme Court.

the state court's decision to run his two state sentences concurrently. Setser contends that either the consecutive or the concurrent sentence must be given priority, and that it is not clear from the record what the district court fully intended. Initially, Setser asserted that once he was transferred to federal custody, the BOP would not be able to correctly calculate his sentence as a result of this inherent ambiguity. Setser therefore requested that this Court declare his consecutive sentence unreasonable and either reverse and remand for re-sentencing, or strike the consecutive sentence and order that his 151 months be served concurrently to both state sentences. Finding no error in the district court's sentence, we decline to reverse or remand for re-sentencing.

A sentence may be illegal if it is "'ambiguous with respect to the time and manner in which it is to be served, is internally self-contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the statute or is a sentence which the judgment of conviction did not authorize.'" *United States v. Dougherty*, 106 F.3d 1514, 1525 (10th Cir. 1997) (quoting *United States v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991)). "Criminal sentences must 'reveal with fair certainty the intent of the court to exclude any serious misapprehensions by those who must execute them.'" *United States v. Garza*, 448 F.3d 294, 302 (5th Cir. 2006) (quoting *United States v. Daugherty*, 269 U.S. 360, 363 (1926)). In the present case, however, there is nothing plainly self-contradictory or uncertain about the sentence in and of itself. Quite to the contrary, the federal sentence alone is quite clear. Any ambiguity in the district court's sentence was not introduced until after the state court ordered Setser's two state sentences to run concurrently.

It is important to note that Setser's "contention that the sentence is 'impossible' to fulfill stems not from an inherent flaw on the face of the court's sentencing papers, . . . but from the very practical problems that arise in carrying out overlapping state and federal sentences in a dual sovereignty." *United States v. Cibrian*, 2010 WL 1141676, *5 (5th Cir., Mar. 14, 2010) (unpublished). That is, in *Cibrian*, this Court noted that "[t]he irreconcilability of [a defendant's] federal and state sentences is a well-documented practicality of our system of contemporaneous jurisdiction." *Id.* at 7. As a result of this dual system of jurisdiction, in some instances—as in here—it is "the federal sentence [that may be] partially foiled, [and] in other cases, it is the state sentence that suffers the intrusion." *Id.* A subsequently issued state court sentence, therefore, does not render an otherwise legal federal sentence illegal.

Furthermore, now that Setser is in the custody of the BOP, and the BOP has determined that Setser is not entitled to any credit for the time he spent in state custody, we are currently without the power or the authority to order the BOP to calculate Setser's sentence in any certain manner. Notably, "the United States Supreme Court [has] held that § 3585(b) does not authorize a . . . court to compute credit for time spent in official detention at sentencing, but [rather,] credit awards are to be made by the Attorney General, through the Bureau of Prisons, after sentencing." *United States v. Dowling*, 962 F.2d 390, 393 (5th Cir. 1992) (citing *United States v. Wilson*, 503 U.S. 329 (1992)). In the event that a prisoner feels he has been improperly refused credit for time he has served in state custody, the prisoner must first "seek administrative review of the computations of [his] credit, and, once [he has] exhausted [his] administrative remedies, [the] prisone[r] may only *then* pursue judicial review of these

computations." *Id.* (citing *Wilson*, 503 U.S. at 335; 28 C.F.R. §§ 542.10-542.16 (1990)) (internal citations omitted); *see also Lundy v. Osborn*, 555 F.2d 534, 534-35 (5th Cir. 1977) ("[G]rievances of prisoners concerning prison administration should be presented to the Bureau [of Prisons] through the available administrative channels. Only after such remedies are exhausted will the court entertain the application for relief in an appropriate case.").[***]

Thus, although his appeal began as a challenge to the ambiguity regarding how the BOP might interpret and carry out the district court's sentence, the BOP has subsequently interpreted and carried out the sentence. The BOP's interpretation of Setser's sentence, however, is not properly before this Court. At this juncture, should Setser wish to contest the BOP's denial of credit for the time he served in state custody, Setser must first pursue his administrative remedies pursuant to 28 C.F.R. §§ 542.10-542.16 (2002).

IV. CONCLUSION

For the aforementioned reasons, we conclude that the district court's imposition of a consecutive sentence was well within the district court's authority pursuant to 18 U.S.C. § 3584, and as a result, the district court's sentence was not illegal or unreasonable. Accordingly, we find that the district court did not abuse its discretion, and we AFFIRM. All pending motions are denied.

[***] This Court has previously dismissed a prisoner's appeal of the BOP's interpretation and calculation of his sentence if the prisoner has failed to exhaust his administrative remedies. That is, once a prisoner has exhausted his administrative remedies, he may "fil[e] a pro se petition for habeas relief under 28 U.S.C. § 2241, challenging the BOP's computation of his sentence . . . ." *Dominguez v. Williamson*, 251 F.3d 156, at *2 (5th Cir. 2001). However, "this court has determined that a § 2241 petitioner must first exhaust his administrative remedies through the Bureau of Prisons." *Rourke v. Thompson*, 11 F.3d 47, 49 (5th Cir. 1993).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-10835

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MONROE ACE SETSER

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Lubbock

ON PETITION FOR REHEARING EN BANC

(Opinion 5/11/2010, 5 Cir., _____, _____, F.3d _____)

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG6A

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 22 2008
CLERK, U.S. DISTRICT COURT
By _____ Deputy

United States District Court

Northern District of Texas
Lubbock Division

UNITED STATES OF AMERICA

v.

Case Number 5:08-CR-024-01-C
USM No. 34437-177

MONROE ACE SETSER
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, MONROE ACE SETSER, was represented by Helen M. Liggett.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to this defendant.

The defendant pleaded guilty to count 1 of the indictment filed on 03/12/2008. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
21 USC § 841(a)(1) & (b)(1)(A)(viii) and 18 USC § 2	Possession With Intent to Distribute 50 Grams or More of Methamphetamine and Aiding and Abetting	10/01/2007	1

As pronounced on 08/22/2008, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 22nd day of August, 2008.

DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 151 months with this term of imprisonment to be served consecutive with any sentence imposed in Case No. 2006-412,543, pending in the 137th District Court, Lubbock County, Texas, and to be served concurrently with any sentence imposed in Case No. 2007-418,142 pending in the 137th District Court, Lubbock County, Texas.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
■ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $40.00 per month.

2. The defendant shall cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004.

CASE NO. 2007-418,142 COUNT I
INCIDENT NO./TRN: 912692398X

THE STATE OF TEXAS	§	IN THE 137TH DISTRICT
V.	§	COURT
MONROE A. SETSER	§	LUBBOCK COUNTY, TEXAS
STATE ID NO.: TX 4522486	§	

FILED FOR RECORD
DISTRICT CLERK LUBBOCK CO.
BY _____ DEPUTY
2008 DEC 18 PM 1:28

JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL

Judge Presiding: HON. CECIL G PURYEAR
Date Judgment Entered: 12/18/08

Attorney for State: AMANDA SAY
Attorney for Defendant: MIKE BROWN

Offense for which Defendant Convicted:
POSSESSION W/INT. TO DELIVER CONTROLLED SUBSTANCE PG1 METHAMPHETAMINE 200-400 grams

Charging Instrument: **INDICTMENT**
Statute for Offense: **§ 481.112(f)**

Date of Offense: **OCTOBER 1 ,2007**

Degree of Offense: **AGGRAVATED 1st DEGREE FELONY**
Plea to Offense: **GUILTY**
Findings on Deadly Weapon: **NA**

Terms of Plea Bargain: **TEN (10)) YEARS TDCJ-ID**

Plea to 1st Enhancement Paragraph: NA
Plea to 2nd Enhancement/Habitual Paragraph: NA
Findings on 1st Enhancement Paragraph: NA
Findings on 2nd Enhancement/Habitual Paragraph: NA

Date Sentence Imposed/to Commence: 12/18/08

Punishment and Place of Confinement: **TEN (10) YEARS TDCJ-ID**

THIS SENTENCE SHALL RUN CONCURRENT

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR.

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$1.00	$ 139.00	$140.00	☐ VICTIM (see below) ☒ AGENCY/AGENT

Sex Offender Registration Requirements DOES NOT APPLY to the Defendant. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was NA .

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:
From 10/1/07 to Present From ____ to ____ From ____ to ____
From ____ to ____ From ____ to ____ From ____ to ____

If Defendant is to serve sentence in jail or is given credit toward fine and costs, enter days credited below.

TOTAL DAYS: NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Lubbock County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. The Court then admonished Defendant as required by law. It appeared to Court that Defendant was mentally competent to stand trial, made the plea freely and voluntarily and was aware of the consequences of this plea. The Court received the plea and entered it of record. Having heard the evidence submitted, the Court found Defendant guilty of the offense indicated above. In the presence of the Defendant, the Court pronounced sentence against Defendant.

The Court FINDS Defendant committed the above offense and ORDERS, ADJUDGES AND DECREES that Defendant is GUILTY of the above offense. The Court FINDS the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court ORDERS Defendant punished as indicated above. The Court ORDERS Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court ORDERS the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the TDCJ-ID. The Court ORDERS Defendant to be confined for the period and in the manner indicated above. The Court ORDERS Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court ORDERS that upon release from confinement, Defendant proceed immediately to the Lubbock County Collections Department. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court ORDERS Defendant immediately committed to the custody of the Sheriff of Lubbock County, Texas on the date the sentence is to commence. Defendant shall be confined in the Lubbock County Jail for the period indicated above. The Court ORDERS that upon release from confinement, Defendant shall proceed immediately to the Lubbock County Collections Department. Once there, the Court ORDERS Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a FINE ONLY. The Court ORDERS Defendant to proceed immediately to the Lubbock County Collections Department. Once there, the Court ORDERS Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☒ The Court ORDERS Defendant's sentence EXECUTED.

☐ The Court ORDERS Defendant's sentence of confinement SUSPENDED. The Court ORDERS Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court ORDERS that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

Court Costs	$ 333.00
Attorney Fee	$ 300.00
Fine	$1.00

Dismissals: COUNT II

The Defendant waives any and all interest in any property seized in connection with this case (real or personal, tangible or intangible) which is the subject of any civil forfeiture action.

Signed and entered on this the 18th day of December, 2008.

X [signature]
CECIL G PURYEAR
JUDGE PRESIDING

UNDER EXCHANGE OF BENCHES

MONROE A. SETSER

2007-418,142 137TH

RECEIPT OF DEFENDANT

I, the undersigned Defendant in the above described cause, on this day received from the clerk of this Court a copy of the above Order

SIGNED this the 18 day of December ,2008 A.D.

Monroe Lee Setser
Defendant

I, Barbara Sucsy, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 11 day of Mar 2009

Clerk of District Court, Lubbock County, Texas By Deputy

CASE NO. 2006-412,543
INCIDENT NO./TRN: 9126769883

FILED FOR RECORD
DISTRICT CLERK LUBBOCK CO.
2008 DEC 18 PM 1:27
DEPUTY

THE STATE OF TEXAS	§	IN THE 137TH DISTRICT
V.	§	COURT
MONROE A. SETSER	§	LUBBOCK COUNTY, TEXAS
STATE ID NO.: TX 4522486	§	

JUDGMENT REVOKING COMMUNITY SUPERVISION

Judge Presiding: HON. Cecil G. Puryear — Date Judgment Entered: 12/18/08

Attorney for State: Amanda Say — Attorney for Defendant: Mike Brown

Date of Original Community Supervision Order: March 6, 2007 — Statute for Offense: § 481.112 H&S

Offense for which Defendant Convicted: Possession of a Controlled Substance with Intent to Deliver PG1 Methamphetamine 4-200 grams

Date of Offense: March 25, 2006

Degree of Offense: 1st Degree Felony — Plea to Motion to Revoke: TRUE — Findings on Deadly Weapon: NA

Original Punishment Assessed: Five (5) Years TDCJ-ID Probated Five (5) Years FINE: $NA

Shock Community Supervision: FINE: $ NA

Date Sentence Imposed/to Commence: 12/18/08

Punishment and Place of Confinement: Five (5) Years TDCJ-ID

THIS SENTENCE SHALL RUN Concurrently.

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$	$ 24	$ 140.00	☐ VICTIM (see below) ☒ AGENCY/AGENT

IS ORIGINAL JUDGMENT / SENTENCE REFORMED? NO

☐ In accordance with Section 12.44(a) Penal Code, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. Defendant is adjudged to be guilty of a state jail felony and is assessed punishment indicated above.

Sex Offender Registration Requirements Does not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was .

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:
From 3/25/08 to 4/1/08 From 10/1/07 to PRESENT From _____ to _____
From _____ to _____ From _____ to _____ From _____ to _____

If Defendant is to serve sentence in jail or is given credit toward fine and costs, enter days credited below.

TOTAL DAYS: NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called in Lubbock County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

The State filed a motion to revoke Defendant's community supervision. After hearing the State's motion, Defendant's plea, the evidence submitted, and reviewing the record, the Court GRANTS the State's motion. The Court's record indicates that Defendant was

previously convicted of a felony offense and punishment was assessed as indicated above. The record indicates the Court ordered imposition of Defendant's sentence of confinement suspended and placed Defendant on community supervision for **Five (5) Years.**

The Court **FINDS** Defendant has violated the conditions of community supervision as set out in the State's Amended Motion to Revoke Community Supervision as follows: **A,B,D,F,K(1&2),Q,V-See Attached**

Accordingly, the Court **ORDERS** the previous orders in this cause suspending imposition of sentence of confinement and placing Defendant on community supervision **REVOKED. (select one of the following)**

☒ The Court **ORDERS** Defendant punished in accordance with the judgment and sentence originally entered in this cause.

☐ Finding it to be in the interest of justice, the Court **ORDERS** Defendant punished in accordance with the reformed judgment and sentence indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the TDCJ-ID. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of Lubbock County, Texas on the date the sentence is to commence. Defendant shall be confined in the Lubbock County Jail for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY.** The Court **ORDERS** Defendant to proceed immediately to the Lubbock County Collections Department County . Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

The Court **ORDERS** Defendant's sentence **EXECUTED.**

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

The Court further **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

Furthermore, the following special findings or orders apply:

Court Costs	$ 132	**APO Fee**	**$960.00**
Attorney Fees	$_____	**Restitution**	**$140.00**

The Defendant waives any and all interest in any cash and or real property (real or personal, tangible or intangible) subject to any pending civil forfeiture case.

Signed and entered on this the 18th **day of** December, 2008.

x _____

Cecil G. Puryear

JUDGE PRESIDING UNDER EXCHANGE OF BENCHES

OPPOSITION BRIEF

No. 10-7387

IN THE SUPREME COURT OF THE UNITED STATES

MONROE ACE SETSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred by directing that petitioner's federal sentence be served consecutively to a state sentence that had not yet been imposed.

IN THE SUPREME COURT OF THE UNITED STATES

No. 10-7387

MONROE ACE SETSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 607 F.3d 128.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. A petition for rehearing was denied on August 5, 2010 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on November 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2. He was sentenced to 151 months of imprisonment, to be followed by five years of supervised release. Pet. App. 11a-14a. The court of appeals affirmed. Id. at 1a-8a.

1. On October 1, 2007, police officers observed petitioner driving with a defective headlight and stopped his car. Presentence Report (PSR) ¶ 8. When petitioner unexpectedly exited the car, the officers searched him. They discovered 11 grams of marijuana and $1740 in United States currency on his person. PSR ¶ 9. A further search of petitioner's vehicle uncovered hydrocodone, methamphetamine, pure cocaine base, a semiautomatic handgun, and assorted handgun ammunition. PSR ¶¶ 10-11. Petitioner was then taken into custody on Texas state narcotics charges. PSR ¶ 12. While he was in custody, agents discovered that petitioner had previously committed a felony drug offense -- for which he was still on probation -- and was not legally allowed to possess a firearm. PSR ¶ 14.

2. A federal grand jury sitting in the Northern District of Texas returned a three-count indictment charging petitioner with possession of 50 grams or more of methamphetamine with intent to

distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2; possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) and 2; and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and 2. PSR ¶ 2. Petitioner pleaded guilty to the methamphetamine-possession count. PSR ¶ 1.

The PSR recommended an advisory Sentencing Guidelines range of 121 to 151 months of imprisonment. PSR ¶ 85. The PSR reported that petitioner faced pending Texas state charges both for the narcotics offense and for violation of probation. PSR ¶¶ 87-88. The PSR noted that under Fifth Circuit precedent, the district court had the discretion to impose a sentence consecutive to any sentence that might be imposed on the state charges. PSR ¶ 86 (citing United States v. Brown, 920 F.2d 1212 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991)). Petitioner objected to the probation officer's statement that the district court had the power to impose a sentence consecutive to a not-yet-imposed state sentence. Add. to PSR 2.

The district court sentenced petitioner to 151 months of imprisonment, to be followed by five years of supervised release. See Pet. App. 11a-13a. The court provided that the sentence would run concurrently with any sentence imposed by Texas for the narcotics charges, which arose out of the same offense conduct for which the district court was sentencing petitioner, and consecu-

tively to any sentence imposed for petitioner's probation violation. Id. at 12a.

Following sentencing, petitioner was returned to state custody. He was then convicted in Texas state court on the narcotics charges, and his probation on the 2006 offense was revoked. A Texas state court sentenced him to ten years of imprisonment on the narcotics charge and five years on revocation of probation, to be served concurrently with one another. Pet. App. 2a. After approximately two and a half years in state custody, petitioner's state convictions were deemed satisfied and he was paroled to federal custody. Ibid.; Gov't C.A. Mot. to Supplement Record Exh. A at 5-6. Petitioner began serving his federal sentence on March 17, 2010. His projected release date from federal prison is March 3, 2021. Petitioner was not accorded credit against his federal sentence for any of the time he had served in the state system. Id. at 3, 4; see Pet. App. 2a-3a.

3. The court of appeals affirmed. Pet. App. 1a-8a. Petitioner acknowledged, and the court of appeals agreed, that under binding circuit precedent, the district court had discretion to order petitioner's sentence to run consecutively to a not-yet-imposed state sentence. Id. at 3a-5a (citing Brown, supra).

ARGUMENT

Petitioner contends (Pet. 5-7) that this Court's review is warranted because the courts of appeals are divided over whether a

district court has the authority under 18 U.S.C. 3584(a) to direct that a sentence run consecutively to a state sentence that has not yet been imposed. The government agrees with petitioner that district courts lack such authority. Nevertheless, for two reasons, further review in this case is not warranted to resolve the circuit conflict on that issue. First, the issue lacks real significance because, as a practical matter, state courts and the Federal Bureau of Prisons (BOP) can reach their own decisions about whether to take into account service in another sovereign's correctional system, irrespective of whether Section 3584(a) authorizes federal district courts to embody such decisions in a judgment of conviction and sentence. Consistent with that conclusion, this Court has denied numerous petitions raising the issue. Second, petitioner's contention is that the district court's consecutive-sentence order precludes him from asking the BOP to credit his state imprisonment against his federal sentence by designating his state prison, nunc pro tunc, as his federal place of incarceration. But before making any such nunc pro tunc determination, the BOP always seeks the views of the sentencing judge. Thus, the question whether the sentencing judge may embody those views in a judgment has no real practical significance. Because petitioner would be highly unlikely to qualify for a favorable exercise of BOP's discretion to make a nunc pro tunc

determination even if the consecutive-sentence order were stricken from the judgment, that order has had no practical effect on him.

1. As petitioner points out (Pet. 5-7), the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively to a yet-to-be-imposed state sentence. In the government's view, contrary to the current position of the court below, Section 3584(a) does not confer that authority. Nevertheless, further review is not warranted.

The first sentence of Section 3584(a) identifies two situations in which a district court may take into account other sentences: when "multiple terms of imprisonment are imposed on a defendant at the same time," and when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." The second and third sentences establish the default presumptions that correspond to each of those two situations when the district court's order is silent on whether the sentences are to be consecutive or concurrent. A federal defendant who has not yet received, but may one day receive, a sentence in a separate state court proceeding does not fall within either of the two situations specified in the first sentence of Section 3584(a). For that reason, in the government's view, the presumptions set out in the remainder of that subsection have no application to such a defendant.

The Second, Sixth, and Ninth Circuits have taken that view. United States v. Donoso, 521 F.3d 144, 146-149 (2d Cir. 2008) (per curiam); United States v. Quintero, 157 F.3d 1038, 1039-1041 (6th Cir. 1998); United States v. Clayton, 927 F.2d 491, 492-493 (9th Cir. 1991); see also United States v. Smith, 472 F.3d 222, 225-227 (4th Cir. 2006) (holding that a federal district court lacks authority to impose a federal sentence consecutive to an as-yet-unimposed federal sentence). The Seventh Circuit has also held, for distinct reasons, that federal district courts lack authority to impose a sentence that runs consecutively to a future sentence. See Romandine v. United States, 206 F.3d 731, 737-738 (2000).

Four courts of appeals, including the court below, have taken the contrary view. Those courts have concluded either that federal district courts have the inherent authority to impose consecutive sentences and that Section 3584(a) does not withdraw it, see United States v. Brown, 920 F.2d 1212, 1217 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991); United States v. Mayotte, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam), or that Section 3584(a)'s third sentence affirmatively permits terms of imprisonment to be run consecutively even before the second term of imprisonment has been imposed, see United States v. Williams, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995); United States v. Ballard, 6 F.3d 1502, 1507-1510 (11th Cir. 1993). If those interpretations

were correct, however, Congress's specification, in the first sentence of Section 3584(a), of two situations in which the court has discretion to run sentences concurrently or consecutively would have been unnecessary: if courts had inherent authority to make consecutive-versus-concurrent determinations, the limiting conditions in the first sentence would be beside the point, and if Section 3584(a)'s third sentence conferred authority to run sentences consecutively or concurrently in all cases in which sentences are imposed at different times, it would have made little sense for the first sentence to refer to a sentencing court's authority when the defendant has a prior undischarged term of imprisonment. Treating Section 3584(a) as an integrated whole avoids rendering its provisions partially superfluous.[1]

2. As the government has previously explained, however, the differences between the circuits' interpretations of Section 3584(a) have little practical impact. Accordingly, this Court has repeatedly declined to review the question presented. See, e.g., Ortiz-Coca v. United States, 130 S. Ct. 2370 (2010) (No. 09-7636); Aguilar-Mendez v. United States, 130 S. Ct. 2370 (2010) (No. 09-7639); Garcia-Quiroz v. United States, 130 S. Ct. 2370 (2010) (No.

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[1] That reading is confirmed by 18 U.S.C. 3584(b), which directs federal courts to consider the sentencing factors set out in 18 U.S.C. 3553(a) in deciding whether to impose concurrent or consecutive terms of imprisonment. Several of those factors involve consideration of the total length of incarceration, see, e.g., 18 U.S.C. 3553(a)(2)(B), (2)(C) and (6), and that analysis cannot logically take place when one of the defendant's sentences has not yet been determined, and indeed may never be imposed.

09-7643); Mancilla-Lopez v. United States, 130 S. Ct. 2370 (2010) (No. 09-7644).[2]

The question does not require resolution by this Court because under current law, the second court to sentence a defendant will often make its own decision concerning how long the defendant will spend in prison, irrespective of whether the first sentencing court specified a concurrent or consecutive sentence. For example, if a defendant is sentenced in state court after being sentenced in federal court, the state court can adjust the length of the state sentence (or suspend a portion of the sentence) to take into account the time the defendant has served or will serve in federal custody. See, e.g., Romandine, 206 F.3d at 738 (explaining that the correct "answer" to the circuit conflict "does not matter, and the conflict is illusory").

Even when a defendant faces both federal and state sentences, the terms often do not overlap, simply because the sovereign with primary jurisdiction over the defendant is not required to yield custody to the other sovereign; it may keep control over the defendant until the sentence expires. See generally Ponzi v. Fessenden, 258 U.S. 254, 261 (1922) (explaining primary jurisdiction over defendants prosecuted by separate sovereigns). Even if, as here, the sovereign with primary jurisdiction permits the other

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[2] The same question is also asserted by the pending petitions for writs of certiorari in Vargas-Solis v. United States, No. 10-6866 (filed Oct. 5, 2010); and Gayford v. United States, No. 10-7343 (filed Oct. 12, 2010).

sovereign to try and convict the defendant during that time, the other sovereign is not entitled to execute its sentence by immediately taking the defendant into custody.

Of the four courts of appeals that permit federal courts to impose a sentence consecutively to a not-yet-imposed state sentence, two (including the court below) have mitigated the effect of that holding by suggesting that a federal judgment containing such a directive does not bar the state court from taking steps in the future to permit a concurrent sentence. See United States v. Quintana-Gomez, 521 F.3d 495, 497 (5th Cir. 2008); United States v. Andrews, 330 F.3d 1305, 1307 n.1 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); see also United States v. Douglas, 569 F.3d 523, 527 n.2 (5th Cir. 2009) (defendant withdrew his challenge "because the state proceedings concluded and the state court has chosen to run his state sentence concurrently with the time he is serving in federal custody"). The other two circuits have not clearly spoken to the question whether a state court is so bound. The Tenth Circuit has said that a state court cannot override a federal court's determination, but on the facts of that case, the State effectively did so by releasing the defendant to federal custody with the statement that he had satisfied his state sentence. Williams, 46 F.3d at 58. The Eighth Circuit has said that "the federal sentence controls" in the event of a conflict, Mayotte, 249 F.3d at 799, but did not address the practical implementation of that statement. See also United States v. Hayes,

535 F.3d 907, 910 (8th Cir. 2008) (district court recognized that any direction it might give would have no effect if "the state court decides to run its sentence concurrently, which they are free to do"), cert. denied, 129 S. Ct. 1983 (2009). Thus, even in the circuits that read Section 3584(a) to authorize a sentence consecutive to a future sentence, any practical impact of that interpretation on subsequent sentencing courts is speculative at best.

3. a. The BOP's procedure for considering administrative concurrent-sentencing requests further illustrates why a consecutive-sentencing order like the one in this case has scant practical impact on a defendant in petitioner's position. Striking the consecutive-sentencing order from the judgment in petitioner's case would not entitle petitioner to a concurrent sentence, as petitioner concedes. Rather, petitioner argues (Pet. 8-10) that the district court's consecutive-sentence order precluded him from asking the BOP to exercise its discretion to make a nunc pro tunc determination that would effectively credit his state imprisonment against his federal sentence. But in making that determination, even if the district court had said nothing in its judgment about consecutive or concurrent sentencing in this case, the BOP would still have sought the district court's views on whether petitioner's federal sentence should be served concurrently or consecutively to his state sentences. See Federal Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5160.05,

Designation of State Institution for Service of Federal Sentence § 9(4)(c), at 6 (2003) ("In making the determination, if a designation for concurrent service may be appropriate (e.g., the federal sentence is imposed first and there is no order or recommendation regarding the service of the sentence in relationship to the yet to be imposed state term), [a BOP official] will send a letter to the sentencing court * * * inquiring whether the court has any objections."); see 18 U.S.C. 3621(b)(4). As in all cases in which the district court affirmatively orders in the judgment that the sentences be consecutive, it is apparent that the district court would be unlikely to respond to such a letter by endorsing a request to run the federal sentence concurrently with petitioner's state sentence for violating probation. That is a further reason why the question whether Section 3584(a) permits a sentencing court to order, or merely recommend, a consecutive sentence is not a significant one warranting plenary review.

Moreover, although the sentencing court's views are not the only factor considered, see 18 U.S.C. 3621(b)(1)-(5); Trowell v. Beeler, 135 Fed. Appx. 590, 594-595 (4th Cir. 2005), nothing indicates that the other factors would favor petitioner such that BOP might plausibly exercise its "wide discretion," Barden v. Keohane, 921 F.2d 476, 483 (3d Cir. 1990), to grant petitioner a nunc pro tunc order. Most significantly, petitioner committed the instant offense while on probation for another, unrelated drug offense. The Sentencing Commission (whose recommendation is

another pertinent factor, see 18 U.S.C. 3621(b)(5)) favors a consecutive sentence in those circumstances, so that the defendant will still face a penalty for the original crime for which probation was imposed and violated. See Sentencing Guidelines § 5G1.3, comment. (n.3(C)).

b. Petitioner contends that the unusual facts of his case have precluded the implementation of the district court's own wishes, as reflected in the consecutive-sentencing order, but petitioner has an open avenue of relief from the BOP on that issue. Petitioner asserts (Pet. 8-10) that his probation-revocation sentence (for which the district court favored a consecutive sentence) has effectively been subsumed by his longer sentence on the 2007 state conviction (for which the district court favored a concurrent sentence); that he has a good argument for running the 2007 sentence concurrently with his federal sentence, because they arose from the same conduct; and that the BOP therefore would be likely to grant him a nunc pro tunc designation if it were permitted to do so by the district court's judgment. But to the extent that petitioner relies on a circumstance that was not actually before the district court at sentencing, and that is not expressly addressed in the judgment (which presumes that the federal sentence can be run consecutively to one state sentence but not the other), the sentencing order does not prevent him from obtaining the relief he seeks from the BOP. If a sentencing order is ambiguous, the BOP always seeks the further advice of the

sentencing court when evaluating nunc pro tunc requests. Petitioner accordingly can present the facts of his case to the BOP and seek a nunc pro tunc order that would run his sentence concurrently with his state sentence for the 2007 conviction. And in the event of an adverse determination, BOP's administrative remedy program and appeals process would be open to him. See generally Federal Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 1330.16, Administrative Remedy Program (2007). In light of those unexhausted administrative remedies, the inclusion of the consecutive-sentencing order in petitioner's federal judgment has not caused him any discernible prejudice.

4. Even if the question presented had some practical significance, in petitioner's case or others, there is reason to believe that the practice of anticipatory consecutive sentencing is becoming less common. Since this case arose, the government has taken steps to ensure that federal prosecutors act consistently with the interpretation of Section 3584(a) discussed above. On January 8, 2009, after the sentence was imposed in this case, the Executive Office for United States Attorneys informed all United States Attorneys' Offices that the Solicitor General, on behalf of the Department of Justice, had adopted that interpretation. In accompanying guidance, all federal prosecutors were directed to urge sentencing courts not to order that a sentence run consecutively to (or concurrently with) a yet-to-be-imposed sentence. Although some district courts have continued to impose such

sentences even after the government expressed its position, the government will not defend such an order except where circuit precedent (or the plain-error standard of review) dictates otherwise.

The government has also urged the court below to reconsider its circuit precedent in an appropriate case. See, e.g., Gov't Resp. to Pet. for Reh'g En Banc at 1-15, United States v. Vargas-Solis, No. 09-50240 (5th Cir. filed May 27, 2010). Although the court of appeals has not yet done so, two judges of that court have expressly advocated re-examining the issue in an appropriate case. See United States v. Garcia-Espinoza, 325 Fed. Appx. 380, 382 (5th Cir. 2009) (Owen, J., joined by Dennis, J., concurring). The full court has not yet taken up that invitation, and the panel in this case suggested that it may not do so. See Pet. App. 5a & n.**. Petitioner accordingly suggests (Pet. 10-11) that plenary review is warranted. But given the doubtful significance of the question presented, the court of appeals' failure to date to reconsider its precedent is not a sufficient reason for this Court to grant plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2011

REPLY BRIEF

No. 10-7387

In the
Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

The government's opposition fails to raise any compelling reason why this Court should allow the unlawful sentencing practice to continue in the courts below. As the petition makes clear, the consecutive order within the district court's judgment was unlawful and palpably harmed Petitioner. Despite the government's concession of error, the Court of Appeals has definitively stated that it will not revisit its erroneous precedent absent correction from this Court.

1. The government argues that the illegal orders "have little practical impact" because "the second court to sentence a defendant will often make its own decision concerning how long the defendant will spend in prison, irrespective of whether the first sentencing court specified a concurrent or consecutive sentence." Gov't Br. 8–9. But that argument ignores the facts before the Court in the instant case. Here, the "second court" to sentence Petitioner did exactly what the government suggests—it ordered the state sentences to run "concurrent" and "concurrently." Pet. app. 15a, 18a. Yet, because of the illegal federal consecutive order, there is no indication that Petitioner will receive credit for the time he spent in state custody.

Given these facts, it is odd that the government cites *United States v. Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008), in support of its position. *Quintana-Gomez* held that a federal district court does not have authority to order its sentence to run consecutive to an anticipated *federal* sentence in a separate district—a position that stands in stark tension with the rule

challenged here. Recognizing this tension, the *Quintana-Gomez* court suggested that, even under *United States v. Brown*, 920 F.2d 1212 (5th Cir. 1991) (per curiam), the subsequent state court was free to "order its sentence to run concurrently with the federal sentence if it chose to do so." *Quintana-Gomez*, 521 F.3d at 497. Here, that is exactly what the state court "chose to do," yet the illegal federal order remains in the federal judgment, and that is the judgment that will control B.O.P.'s execution of the sentence.[1]

2. The government also argues that this Court should ignore the illegal sentencing practice because, at present, B.O.P. inquires about a judge's preference before the agency makes a determination about nunc pro tunc designation. The government claims that

> in all cases in which the district court affirmatively orders in the judgment that the sentences be consecutive, it is apparent that the district court would be unlikley to respond to such a letter by endorsing a request to run the federal sentence concurrently with petitioner's state sentence for violating probation.

(Gov't Br. at 12.) But this claim fails (in general) for at least two reasons, and it is inapplicable (in the present case) for a third.

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[1] This case is distinguishable from *United States v. Douglas*, 569 F.3d 523, 527 n.2 (5th Cir. 2009), because the defendant in *Douglas* was in primary federal custody. *See* Letter Responding to Supplemental Authorities, *United States v. Douglas*, No. 07-11007 (5th Cir. filed Jan. 22, 2009) ("Mr. Douglas is currently in federal custody."). As such, the subsequent state court decision to run the sentences concurrently actually eliminated the possibility of additional incarceration. In the present case, Petitioner was in primary state custody when the federal sentence was issued, so the state court's concurrent order had no effect on the previously-issued, subsequently-executed federal sentence.

First, a district court acting pursuant to 18 U.S.C. § 3584 and *Brown* believes it is acting pursuant to statutory authority about a matter of *judicial* discretion. Petitioner and the government agree that § 3584 does not authorize such action when the state sentence has not yet been imposed. However, a district judge who receives a letter from BOP such as the one described by the government would recognize that she is being asked to render advice about an area of administrative competence. Thus, the judge would be more likely to remain silent or to defer to BOP's judgment.

Second, even if a court did choose to respond to such a request, it would do so with *knowledge* of subsequent state court action and of any other intervening facts (such as the prisoner's behavior while incarcerated). In its substantive analysis, the government recognizes the importance of this knowledge: the decision to run a federal sentence consecutive to or concurrent with another sentence must be based upon consideration of "the sentencing factors set out in 18 U.S.C. [§] 3553(a) . . . and that analysis *cannot logically take place* when one of the defendant's sentences has not yet been determined." Gov't Br. at 8 n.1 (emphasis added). One of the main problems with anticipatory-consecutive orders is that the court *does not have* that essential knowledge when it issues the order. As such, *subsequent* decision-making should be encouraged. The fact that a district court might *later* issue a recommendation about the proper relationship of the federal and state sentences, with the benefit of all the essential facts, actually counsels in favor of reviewing and reversing the decision

below. The fact that the court has available a lawful and more reasonable mechanism to express its intention should not shield the premature and unreasonable anticipatory decision from plenary review.

Third, in the present case, it is extremely unlikely that the district court would have imposed the same kind of Janus-faced recommendation after all the facts were in. At the time it entered the consecutive order, the court did not have one crucial fact at its disposal—that the two state sentences would be indistinguishable because they would concurrently with one another. The government assumes that the consecutive order would be preeminent among the court's preferences, so it states that "the district court would be unlikely to respond to such a letter [from BOP to the court requesting a recommendation regarding concurrent credit] by endorsing a request to run the federal sentence concurrently with petitioner's state sentence for violating probation." Gov't Br. at 12. But it is equally or even more "unlikely" that the court would endorse a request to run the federal sentences consecutive to petitioner's state sentence for the very same conduct underlying the federal sentence. And it is even less likely that the district court would issue an impossible recommendation that the federal sentence be both concurrent with and consecutive to the state sentences.

As Petitioner previously explained, there are reasons to believe that, in the absence of the unlawful consecutive order, BOP (with or without the district court's subsequent recommendation) would be inclined to grant Petitioner's request for concurrent credit. (Pet. at 9–10; *see also* Gov't Br. at 13–14.) But

unless this Petition is granted, Petitioner will be "stuck" with the unlawful consecutive order in the judgment. The government asserts that Petitioner may seek relief through "BOP's administrative remedy program and appeals process," but that assurance rings hollow in light of *Pierce v. Holder*, 614 F.3d 158 (5th Cir. 2010). In *Pierce*, the court below announced that a prisoner challenging a district court's "consecutive" order must do so in a direct appeal from that order; the claim is not cognizable in a subsequent challenge to BOP's execution of the unlawful judgment. *Id.* at 160 n.1. As such, Petitioner's direct appeal is the best and only means to correct the unlawful consecutive order.

3. The government also urged this Court to deny review because "there is reason to believe" the illegal sentencing practice "is becoming less common." Gov't Br. at 14. But the government did not provide any "reason" to believe its supposition. It merely noted that the Department of Justice had "directed" "all federal prosecutors" "to urge sentencing courts not to order that sentence run consecutively to . . . a yet-to-be-imposed sentence." Gov't Br. at 14. It also noted that prosecutors "will not defend such an order *except where circuit precedent* . . . dictates otherwise." Gov't Br. at 15 (emphasis added). But that exception swallows the rule. Just last week, the government filed a motion to summarily affirm an unlawful anticipatory consecutive order in the court below. *See* Mot. for Summary Affirmance, *United States v. Joel Arpon*, No. 10-11213 (filed Mar. 8, 2011).

Rumors of the practice's demise have been greatly exaggerated. The Fifth Circuit regularly and habitually affirms anticipatory consecutive sentences despite defendants' challenges. *See, e.g., United States v. Hartwell*, 2011 WL 507455 (5th Cir. Feb. 15, 2011) (unpub.) (holding that *Brown* foreclosed challenge to anticipatory consecutive sentence); *United States v. Cates*, 2011 WL 507450 (5th Cir. Feb. 15, 2011) (unpub.) (same); *United States v. Gonzalez*, 2010 WL 53956652 (5th Cir. Dec. 29, 2010) (unpub.) (same); *United States v. Brown*, 2010 WL 5185492 (5th Cir. Dec. 15, 2010) (unpub.) (same); *United States v. Alfaro-Hernandez*, 2010 WL 5029525 (5th Cir. Dec. 8, 2010) (unpub.) (same); *United States v. Palacios*, 2010 WL 4705836 (5th Cir. Nov. 19, 2010) (unpub.) (same); *United States v. Garcia*, 2010 WL 4559004 (5th Cir. Nov. 8, 2010) (unpub.) (same); *United States v. Bustos*, 2010 WL 4269369 (5th Cir. Oct. 26, 2010) (unpub.) (same); *United States v. Mendoza*, 2010 WL 4116881 (5th Cir. Oct. 19, 2010) (unpub.) (same); *United States v. Johnson*, 396 F. App'x 82 (5th Cir. Sept. 23, 2010) (unpub.) (same); and *United States v. Geurin*, 391 F. App'x 373 (5th Cir. Aug. 17, 2010) (unpub.). Every one of those cases arose because a district court ordered a federal sentence to run consecutive to an as-yet-unimposed state sentence, and more appeals will follow because district courts continue to do this. *See also Davis v. United States*, 2011 WL 121911 (N.D. Tex. Jan. 12, 2011) (No. 3:09-CV-2229-B) (applying *Brown* in context of ineffective assistance challenge); *United States v. Castro*, No. 3:10-CR-204-P (N.D. Tex. Jan. 20, 2011), *appeal docketed*, No. 11-10133 (5th Cir. Feb. 2, 2011) (ordering

a federal sentence to run consecutive to as-yet-unimposed state sentence); and *United States v. Arpon*, No. 4:06-CR-179-A(01) (N.D. Tex. Nov. 22, 2010), *appeal docketed*, No. 10-11213 (5th Cir. Dec. 6, 2010) (same). Moreover, district courts continue to order federal sentences consecutive to some unimposed sentences, and concurrent with others. *See, e.g., United States v. McCullough*, No. 3:10-CR-125-L (N.D. Tex. Dec. 6, 2010). Thus, absent this Court's intervention, cases will continue to present the same kind of unreasonable and self-contradictory instructions that are presented in the present case. As long as *Brown* remains good law, district courts will continue to order federal sentences to run consecutive to some anticipated sentences, without any knowledge of the nature or length of those sentences.

Finally, the government argues that the Fifth Circuit may reconsider *Brown* en banc and reverse its position. However, the Court has repeatedly refused to do so, despite numerous petitions from defendants in a variety of procedural postures. In addition to the present case, the Fifth Circuit denied request for *en banc* hearing or rehearing in *United States v. Garcia-Espinoza*, *United States v. Elizz Garcia*, and in *United States v. Vargas-Solis*. The government even joined the petition in *Vargas-Solis*, but the result was the same. As the Court stated in the opinion in this case, the judges have decided to await correction from this Court. This is the right case in which to issue that correction.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 2011

No. 10-7387

In the Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PROOF OF SERVICE

I, JASON D. HAWKINS, do swear or declare that on this date, March 14, 2011, as required by Supreme Court Rule 29 I have served the enclosed REPLY TO BRIEF IN OPPOSITION on each party to the above proceeding or that party's counsel, and on every other document required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Neal Katyal
Acting Solicitor General of the United States
Room 5614, Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

James Wesley Hendrix
Assistant United States Attorney
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Counsel for the United States

and by electronic mail today to the Office of the Solicitor General at SupremeCtBriefs@USDOJ.gov.

I further certify that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 14, 2011.

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JOINT APPENDIX

RECORD
AD 1
BRIEFS

No. 10-7387

In The Supreme Court of the United States

MONROE ACE SETSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX – VOLUME I

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Petition For Certiorari Filed November 2, 2010
Certiorari Granted June 13, 2011

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U.S. District Court
Northern District of Texas (Lubbock)
CRIMINAL DOCKET FOR
CASE #: 5:08-cr-00024-C-BG-1

Case title: USA v. Setser Date Filed: 03/12/2008

Date Terminated: 08/22/2008

Date Filed	#	Docket Text
03/12/2008	1	INDICTMENT as to Monroe Ace Setser (1) count(s) 1, 2, 3. (egb) (Entered: 03/12/2008)
03/24/2008	5	APPLICATION FOR WRIT OF HABEAS CORPUS, ORDER, AND WRIT ISSUED as to Monroe Ace Setser to Appear on instanter. Issued Writ of Habeas Corpus Ad Prosequendum. (Signed by Magistrate Judge Nancy M Koenig on 3/24/08) (egb) (Entered: 03/24/2008)
03/28/2008	6	Minute Entry for proceedings held before Magistrate Judge Nancy M Koenig: Initial Appearance as to Monroe Ace Setser held on 3/28/08. Appeared on Writ. Deft first appearance. Deft appeared without counsel. Requests appointed counsel. Financial Affidavit executed. Detention Moot. Deft in state custody. (Tape #FTR Digital.) Time in Court: four (4) minutes. (egb) (Entered: 03/28/2008)

03/28/2008 16 ORDER OF DETENTION PENDING TRIAL as to Monroe Ace Setser. (Signed by Magistrate Judge Nancy M Koenig on 3/28/08) (klw) (Entered: 03/28/2008)

05/22/2008 23 Minute Entry for proceedings held before Judge Sam R Cummings: Rearraignment Hearing as to Monroe Ace Setser held on 5/22/2008. Defendant sworn. Plea entered by Monroe Ace Setser (1) Guilty on Count 1. Waiver of Jury Trial. Plea Agreement accepted and filed. Factual Resume filed. Orders for PSI, Disclosure Date, and Setting Sentencing entered. Deft Detention continued. Attorney Appearances: AUSA – Jeff Haag; Defense – Helen Liggett. (Court Reporter Mechelle Daniel.) Time in Court: ten (10) minutes. (egb) (Entered: 05/22/2008)

05/22/2008 24 PLEA AGREEMENT as to Monroe Ace Setser (egb) (Entered: 05/22/2008)

05/22/2008 25 Factual Resume as to Monroe Ace Setser (egb) (Entered: 05/22/2008)

08/22/2008 28 Minute Entry for proceedings held before Judge Sam R Cummings: Sentencing held on 8/22/2008 for Monroe Ace Setser (1) on Count 1 – One hundred fifty one (151) months with this term of imprisonment to be served consecutive with any sentence imposed in Case No. 2006-412,543, pending in

the 137th District Court, Lubbock County, Texas, and to be served concurrently with any sentence imposed in Case No. 2007-418,142 pending in the 137th District Court, Lubbock County, Texas; Five (5) year term of supervised release with standard and special conditions; $100.00 – Mandatory Special Assessment. Count(s) 2, 3 – Dismissed on Government's oral motion, Order granting. Deft advised of his right to appeal. Deft remanded to custody. Court recommends incarceration at FCI Big Spring. Attorney Appearances: AUSA – Jeff Haag; Defense – Helen Liggett. (Court Reporter Mechelle Daniel.) Time in Court: five (5) minutes. (ebc) (Entered: 08/22/2008)

08/22/2008 29 JUDGMENT Monroe Ace Setser (1) on Count 1 • One hundred fifty one (151) months with this term of imprisonment to be served consecutive with any sentence imposed in Case No. 2006-412,543, pending in the 137th District Court, Lubbock County, Texas, and to be served concurrently with any sentence imposed in Case No. 2007-418,142 pending in the 137th District Court, Lubbock County, Texas; Five (5) year term of supervised release with standard and special conditions; $100.00 • Mandatory Special Assessment; Count(s) 2, 3 • Dismissed on Government's oral motion, Order

granting. (Signed by Judge Sam R Cummings on 8/22/08) (ebc) (Entered: 08/22/2008)

08/22/2008 30 NOTICE OF APPEAL to the Fifth Circuit as to 29 Judgment,, by Monroe Ace Setser. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (Liggett, Helen) (Entered: 08/22/2008)

General Docket
United States Court of Appeals
for the 5th Circuit

Court of Appeals Docket #: 08-10835
USA v. Monroe Setser

Docketed: 08/26/2008
Termed: 05/11/2010

08/26/2008	Direct criminal case docketed. NOA filed by Appellant Monroe Ace Setser. [08-10835] (RSM)
03/31/2009	UNOPPOSED MOTION filed by Appellant Mr. Monroe Ace Setser to supplement the record on appeal with the judgment and revoking community supervision and imposing sentence entered in Lubbock County, TX 137th DC Case No. 2006-412,543, the judgment of conviction and sentence in Case No. 2007-418, 142, from that same court, and Mr. Setser's "Offender Information" from the TDCJ website [6247456-2]. Date of Service: 03/30/2009 [08-10835] (DMS)
03/31/2009	APPELLANT 'S BRIEF FILED by Mr. Monroe Ace Setser.. # of Copies Provided: 7 A/Pet's Brief deadline satisfied. Appellee's Brief due on 04/30/2009 for Appellee United States of America [08-10835] (GRM)
03/31/2009	CLERK ORDER granting motion to supplement the record on appeal filed by Appellant Mr. Monroe Ace Setser [6247456-2]. [08-10835] (GRM)

12/04/2009	APPELLEE'S BRIEF FILED by USA. # of Copies Provided: 7 E/Res's Brief deadline satisfied. Reply Brief due on 12/18/2009 for Appellant Monroe Ace Setser [08-10835] (GRM)
12/18/2009	APPELLANT'S REPLY BRIEF FILED by Mr. Monroe Ace Setser. # of Copies Provided: 7 Reply Brief deadline satisfied [08-10835] (GRM)
04/12/2010	UNOPPOSED MOTION filed by Appellee USA to supplement the record on appeal with Inmate Information [6510088-2], to strike a portion of Appellee's Brief (Government's ripeness argument is now moot) brief [6510088-3]. Date of service: 04/12/2010 via email – Attorney for Appellant: Hawkins; Attorney for Appellee: Hendrix [08-10835] (James Wesley Hendrix)
04/12/2010	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 04/12/2010 via email – Attorney for Appellant: Hawkins; Attorney for Appellee: Hendrix [08-10835] (James Wesley Hendrix)
04/14/2010	COURT ORDER granting motion to strike portion of brief filed by Appellee USA (government's ripeness argument is now moot) [6510088-3]; granting motion to supplement the record on appeal with inmate information filed by Appellee USA [6510088-2] [08-10835] (MKC)

04/23/2010	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 04/23/2010 via email – Attorney for Appellant(s); Biggs, Hawkins; Attorney for Appellee: Hendrix [08-10835] (James Wesley Hendrix)
04/26/2010	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellant Mr. Monroe Ace Setser Date of Service: 04/26/2010 via email – Attorney for Appellant(s): Biggs, Hawkins; Attorney for Appellee: Hendrix [08-10835] (William Reynolds Biggs)
04/28/2010	ORAL ARGUMENT HEARD before Judges Benavides, Stewart, Southwick. Arguing Person Information Updated for: William Reynolds Biggs arguing for Appellant Monroe Ace Setser; Arguing Person Information Updated for: James Wesley Hendrix arguing for Appellee United States of America [08-10835] (VLB)
05/11/2010	PUBLISHED OPINION FILED. [08-10835 Affirmed] Judge: FPB, Judge: CES, Judge: LHS Mandate pull date is 06/01/2010 for Appellant Monroe Ace Setser; denying motion to stay further proceedings in this court filed by Appellant Mr. Monroe Ace Setser [6198806-3]; denying motion for summary disposition filed by Appellant Mr. Monroe Ace Setser [6178522-2] [08-10835] (JMA)
05/11/2010	JUDGMENT ENTERED AND FILED. [08-10835] (JMA)

05/24/2010	UNOPPOSED MOTION filed by Appellant Mr. Monroe Ace Setser to extend the time to file a rehearing until 06/04/2010 at 11:59 pm [6542382-2], to stay issuance of the mandate [6542382-3]. Date of service: 05/24/2010 via email – Attorney for Appellant(s): Biggs, Hawkins; Attorney for Appellee: Hendrix [08-10835] (Jason Douglas Hawkins)
05/27/2010	COURT ORDER granting motion to extend the time to file a petition for rehearing filed by Appellant Mr. Monroe Ace Setser [6542382-2] until 06/04/2010 Mandate pull date updated to 06/04/2010 for Appellant Monroe Ace Setser; mooting as unnecessary motion to stay issuance of the mandate filed by Appellant Mr. Monroe Ace Setser [6542382-3][08-10835] (GRM)
06/04/2010	PETITION filed by Appellant Mr. Monroe Ace Setser for rehearing en banc [6551062-2]. Date of Service: 06/04/2010 via email – Attorney for Appellant: Hawkins; Attorney for Appellee: Hendrix [08-10835] (Jason Douglas Hawkins)
08/05/2010	COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Monroe Ace Setser [6551062-2] Without Poll. Mandate pull date is 08/12/2010 [08-10835] (GRM)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

THE UNITED STATES OF AMERICA

v. 5-08CR0024-C

MONROE ACE SETSER

INDICTMENT

(Filed Mar. 12, 2008)

COUNT 1: **POSSESSION WITH INTENT TO DISTRIBUTE 50 GRAMS OR MORE OF METHAMPHETAMINE**
Title 21, United States Code, Sections 841(a)(1), (b)(1)(A)(viii).

COUNT 2: **POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME**
Title 18, United States Code, Section 924(c).

COUNT 3: **CONVICTED FELON IN POSSESSION OF A FIREARM**
Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

(3 COUNTS)

A true bill rendered:
Lubbock /s/ Kerry K. Arnold Foreperson

Filed in open court this 12th day of March, A.D. 2008.

Clerk

ARREST WARRANT TO ISSUE

/s/ Sam R. Cummings
UNITED STATES
~~MAGISTRATE~~ District JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	No. 5-08CR0024-C
v.	§	
	§	
MONROE ACE SETSER	§	

INDICTMENT

(Filed Mar. 12, 2008)

The Grand Jury Charges:

Count One
Possession with Intent to Distribute
50 Grams or More of Methamphetamine
(Violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii))

On or about October 1, 2007, in the Lubbock Division of the Northern District of Texas, and elsewhere, **Monroe Ace Setser**, defendant, did knowingly and intentionally possess with intent to distribute 50 grams and more of methamphetamine, a schedule II controlled substance.

In violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A)(viii), and Title 18, United States Code, Section 2.

Count Two
Possession of a Firearm in
Furtherance of a Drug Trafficking Crime
(Violation of 18 U.S.C. § 924(c))

On or about October 1, 2007, in the Lubbock Division of the Northern District of Texas, and elsewhere, **Monroe Ace Setser**, defendant, did knowingly possess a firearm, to wit: a Bryco, Model 38, .380 caliber semi-automatic pistol, serial number 1261457, in furtherance of a drug trafficking crime, that is, Possession with Intent to Distribute 50 Grams or More of Methamphetamine, in violation of Title 21, United States Code, Section 841(a)(1), as charged in count one of this indictment, an offense for which he may be prosecuted in a Court of the United States.

In violation of Title 18, United States Code, Sections 924(c) and 2.

Count Three
Convicted Felon in Possession of a Firearm
(Violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2))

On or about October 1, 2007, in the Lubbock Division of the Northern District of Texas, and elsewhere, **Monroe Ace Setser**, defendant, who had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, did knowingly possess in and affecting interstate and foreign commerce a firearm, to wit: a Bryco, Model 38, .380 caliber semi-automatic pistol, serial number 1261457.

In violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 2.

A TRUE BILL:

/s/ Kerry K. Arnold
FOREMAN

RICHARD B. ROPER
UNITED STATES ATTORNEY

/s/ Jeffrey R. Haag
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UNITED STATES DISTRICT COURT
Northern District of Texas
Lubbock Division

UNITED STATES
OF AMERICA

v.

MONROE ACE SETSER
Defendant.

Case Number
5:08-CR-024-01-C
USM No. 34437-177

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Aug. 22, 2008)

The defendant, MONROE ACE SETSER, was represented by Helen M. Liggett.

On motion of the United States, the Court has dismissed the remaining counts of the indictment as to this defendant.

The defendant pleaded guilty to Count 1 of the Indictment filed on 03/12/2008. Accordingly, the court has adjudged that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
21 U.S.C. § 841(a)(1) & (b)(1)(A)(viii) and 18 USC § 2	Possession With Intent to Distribute 50 Grams or More of Methamphetamine and Aiding and Abetting	10/01/2007	1

As pronounced on 08/22/2008, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 22th day of August, 2008.

/s/ Sam R. Cummings
DISTRICT JUDGE
SAM R. CUMMINGS
UNITED STATES
DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be

imprisoned for a total term of 151 months with this term of imprisonment to be served consecutive with any sentence imposed in Case No. 2006-412,543, pending in the 137th District Court, Lubbock County, Texas, and to be served concurrently with any sentence imposed in Case No. 2007-418,142 pending in the 137th District Court, Lubbock County, Texas.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released

within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include

testing for detection of substance use or abuse. **The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (co-payment) at a rate of at least $40.00 per month.**

2. **The defendant shall cooperate in the collection of DNA as directed by the probation officer,** as authorized by the Justice for All Act of 2004.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,	)	NO. 5:08-CR-024-C
PLAINTIFF,	)	LUBBOCK, TEXAS
VS.	)	
MONROE ACE SETSER,	)	AUGUST 22, 2008
DEFENDANT.	)	

SENTENCING HEARING
BEFORE THE HONORABLE SAM R. CUMMINGS,
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE GOVERNMENT:	UNITED STATES ATTORNEY'S OFFICE 1205 TEXAS AVENUE, SUITE 700 LUBBOCK, TEXAS 79401 BY: JEFFREY R. HAAG
FOR THE DEFENDANT:	FEDERAL PUBLIC DEFENDER'S OFFICE 1205 TEXAS AVENUE, SUITE 506 LUBBOCK, TEXAS 79401 BY: HELEN M. LIGGETT
OFFICIAL COURT REPORTER:	MECHELLE DANIEL 1205 TEXAS AVENUE LUBBOCK, TEXAS 79401 (806) 744-7667

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

* * *

[2] THE COURT: The Court calls for sentencing Cause Number CR5-08-024, United States of America vs. Monroe Setser.

MR. HAAG: The United States is ready, Your Honor.

MS. LIGGETT: The defendant is present and ready, Your Honor.

THE COURT: The file reflects that a presentence report has been prepared. Mr. Setser, have you gone over that report with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: The file also reflects that the government has filed a statement adopting the matters set forth in the presentence report. The defendant has filed objections to the report.

Counsel, if you wish, you may address those objections.

MS. LIGGETT: Your Honor, with regard to Objection 1, the enhancement for the firearm, we will just stand on our written objections.

With regard to Objection 2, it's clear that the Fifth Circuit has held that this Court does have the option of imposing a sentence consecutive to or

concurrent with a yet-to-be-imposed state sentence. And Mr. Setser does have a revocation pending on a probation state sentence. However, because there is a circuit split on this issue, we would object [3] to the imposition of his federal sentence consecutive to that state sentence on the grounds that it's not authorized by statute. And we're making that objection to preserve it for further appellate review.

Thank you, Your Honor.

THE COURT: All right. Government's response?

MR. HAAG: Your Honor, with regard to the first objection, we stand on the addendum. Based upon the firearm's proximity to a large quantity of methamphetamine, it is not clearly – clearly probable that the firearm was possessed in connection with the drug trafficking offense.

With regard to the second objection, as noted in the addendum, United States vs. Brown forecloses that argument.

THE COURT: All right. The Court, having considered the objections of the defense to the presentence report, is of the opinion that the objections should be overruled for the reasons as set forth in the addendum to the report.

The Court then will adopt as the Court's findings those matters set forth in the presentence report, not only as it relates to the background data and

information, but also the analysis made under the sentencing guidelines.

Does the government have any evidence or further argument?

MR. HAAG: Yes, Your Honor. At this time, we would ask the Court to dismiss the remaining counts of the indictment [4] and proceed with Count 1.

THE COURT: That motion is granted.

Does the defense have any evidence or additional argument?

MS. LIGGETT: Your Honor, we would request that the Court make a recommendation to the Bureau of Prisons, although, of course, we know it's not binding, that Mr. Setser serve his incarceration at FCI Big Spring. It's closest to his family and friends. Thank you.

THE COURT: Mr. Setser, you have the right to address the Court this morning prior to the imposition of sentence. You are not required to say anything, should that be your choice, but the law does afford you that right and opportunity. Is there anything which you wish to state to the Court this morning?

THE DEFENDANT: I just want to apologize for any inconvenience or anything I've done wrong.

THE COURT: All right, sir. Mr. Setser, you pleaded guilty to Count 1 of the indictment charging you with possession with intent to distribute 50 grams or more of methamphetamine and aiding and abetting. You having pleaded guilty to that charge, I found you guilty, and I am now adjudging you guilty of that offense.

Having adjudged you guilty, I am now going to impose the following sentence:

[5] First, I'm ordering that you pay a special assessment of $100.

Next, I'm ordering that you be committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 151 months, with this term of imprisonment to be served consecutive with the case described on page 2 of the judgment which is pending in the 137th District Court of Lubbock County, Texas. And it's also to be served concurrent with another case pending in the same court of Lubbock County, Texas, and which is described on page 2 of the judgment.

I will recommend that you be placed at FCI Big Spring.

Upon your release from incarceration, I'm ordering that you serve a 5-year term of supervised release. You will get a copy of the judgment so you will know what the conditions of supervision are. There are some standard conditions, as well as special conditions.

Two of those special conditions include the following:

First, you shall participate in a program approved by the United States Probation Office for the treatment of narcotic, drug, or alcohol dependency.

Next, you shall cooperate in the collection of any DNA as directed by the United States Probation Office.

I will now state on the record the specific reasons [6] for imposing the sentence I have just imposed.

As to the term of incarceration, I have imposed a term of 151 months. I believe this sentence does adequately address the sentencing objectives of punishment and deterrence, as well as meeting those other factors as set forth in Title 18, United States Code, Section 3553(a).

No fine is assessed for the reason I do not believe the defendant has sufficient assets with which to pay a fine.

The supervised release is imposed for the reason I believe the defendant will need this amount of supervision to see that he reassimilates himself back in society, that he obtains suitable employment, that he maintains a law-abiding lifestyle.

The special assessment is imposed because the law mandates that it be.

Now, Mr. Setser, you have the right to appeal as authorized by law or as stated in your plea

agreement. Should you choose to appeal, you must file your notice of appeal within 10 days from today. If you file that notice of appeal, you may also file a motion with the Court seeking permission to appeal at no cost to yourself, but rather at the cost government. Should you file that motion, I will take it under advisement and rule on it just as soon as I can.

You may stand aside.

(END OF HEARING)

[Reporters Certificate Omitted In Printing]

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. (504) 310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130
WWW.CA5.USCOURTS.GOV

March 31, 2009

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 08-10835 USA v. Setser
USDC No. 5:08-CR-24-ALL

The court has granted appellant's unopposed motion to supplement or the record in this case.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

/s/ Gina Randazzo Martin

By: _____
Gina Randazzo Martin,
Deputy Clerk
504-310-7687

Mr. Jeffrey Robert Haag
Mr. Jason Douglas Hawkins
Ms. Karen S. Mitchell

CASE NO. 2007-418,142 COUNT I
INCIDENT NO./TRN: 912692398X

THE STATE OF TEXAS	§	IN THE 137TH DISTRICT
v.	§	COURT
MONROE A. SETSER	§	LUBBOCK COUNTY, TEXAS
STATE ID NO.: TX 4522486	§	

JUDGMENT OF CONVICTION BY COURT – WAIVER OF JURY TRIAL

Judge Presiding:	Hon. **CECIL G PURYEAR**	Date Judgment Entered:	12/18/08
Attorney for State:	**AMANDA SAY**	Attorney for Defendant:	**MIKE BROWN**

Offense for which Defendant Convicted:

POSSESSION W/INT. TO DELIVER CONTROLLED SUBSTANCE PG1 METHAMPHETAMINE 200-400 grams

Charging Instrument:	Statute of Offense:
INDICTMENT	**§ 481.112(f)**

Date of Offense:

OCTOBER 1, 2007

Degree of Offense:	Plea to Offense:	Findings on Deadly Weapon:
AGGRAVATED 1st DEGREE FELONY	**GUILTY**	**NA**

Terms of Plea Bargain:

TEN (10)) YEARS TDCJ-ID

Plea to 1st Enhancement Paragraph:	NA	Plea to 2nd Enhancement/Habitual Paragraph:	NA
Findings on 1st Enhancement Paragraph:	NA	Findings on 2nd Enhancement/ Habitual Paragraph:	NA

Date Sentence Imposed/to Commence: 12/18/08

Punishment and Place of Confinement: **TEN (10) YEARS TDCJ-ID**

THIS SENTENCE SHALL RUN CONCURRENT

☐ **SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR.**

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$1.00	$634.00	**$140.00**	☐ **VICTIM** (see below) ☒ **AGENCY/ AGENT**

Sex Offender Registration Requirements DOES NOT APPLY **to the Defendant**. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was NA.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

From 10/1/07 to present From ___ to ___ From ___ to ___

From ___ to ___ From ___ to ___ From ___ to ___

Time Credited:

If Defendant is to serve sentence in jail or is given credit toward fine and costs, enter days credited below.

TOTAL DAYS: NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Lubbock County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. The Court then admonished Defendant as required by law. It appeared to Court that Defendant was mentally competent to stand trial, made the plea freely and voluntarily and was aware of the consequences of this plea. The Court received the plea and entered it of record. Having heard the evidence submitted, the Court found Defendant guilty of the offense indicated above. In the presence of the Defendant, the Court pronounced sentence against Defendant.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the TDCJ-ID. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail – Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of **Lubbock** County, Texas on the date the sentence is to commence. Defendant shall be confined in the **Lubbock** County Jail for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY**. The Court **ORDERS** Defendant to proceed immediately to the Lubbock County Collections Department Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☒ The Court **ORDERS** Defendant's sentence **EXECUTED**.

☐ The Court **ORDERS** Defendant's sentence of confinement **SUSPENDED**. The Court **ORDERS** Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

Court Costs	$333.00
Attorney Fee	$300.00
Fine	**$1.00**
Dismissals:	**COUNT II**

The Defendant waives any and all interest in any property seized in connection with this case (real or personal, tangible or intangible) which is the subject of any civil forfeiture action.

Signed and entered on this the 18th day of December, 2008

/s/ X Brad Cluded
CECIL G PURYEAR
JUDGE PRESIDING

UNDER EXCHANGE
OF BENCHES

MONROE A. SETSER
2007-418,142 137TH

[Thumbprints Omitted In Printing]

RECEIPT OF DEFENDANT

I, the undersigned Defendant in the above described cause, on this day received from the clerk of this Court a copy of the above Order

SIGNED this the 18 day of December, 2008 A.D.

/s/ Monroe Ace Setser
Defendant

CASE NO. 2006-412,543
INCIDENT NO./TRN: 9126769883

THE STATE OF TEXAS	§IN THE 137TH DISTRICT
v.	§COURT
MONROE A. SETSER	§LUBBOCK COUNTY, TEXAS
STATE ID NO.: TX 4522486	§

JUDGMENT REVOKING COMMUNITY SUPERVISION

Judge Presiding:	HON. **Cecil G Puryear**	Date Judgment Entered:	12/18/08
Attorney for State:	**Amanda Say**	Attorney for Defendant:	**Mike Brown**

Date of Original Community Supervision Order:	Statute for Offense:
March 6, 2007	**§ 481.112 H&S**

Offense for which Defendant Convicted:

Possession of a Controlled Substance with Intent to Deliver PG1 Methamphetamine 4-200 grams

Date of Offense:

March 25, 2006

Degree of Offense:	Plea of Motion to Revoke:	Findings on Deadly Weapon:
1st Degree Felony	**TRUE**	**NA**

Original Punishment Assessed:

Five (5) Years TDCJ-ID
Probated Five (5) Years

FINE: $NA

Shock Community Supervision:

FINE: $NA

Date Sentence Imposed/to Commence: 12/18/08

Punishment and Place of Confinement: **Five (5) Years TDCJ-ID**

THIS SENTENCE SHALL RUN Concurrently

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$	$12.00	**$140.00**	☐ **VICTIM** (see below) ☒ **AGENCY/ AGENT**

IS ORIGINAL JUDGMENT/SENTENCE REFORMED? NO

☐ **In accordance with Section 12.44(a) Penal Code, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. Defendant is adjudged to be guilty of a state jail felony and is assessed punishment indicated above.**

Sex Offender Registration Requirements Does not apply **to the Defendant.** TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was .

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order

Time Credited: From 3/25/06 to 4/1/06 From 10/1/07 to present From __ to ___
From ___ to ___ From ___ to ___
From ___ to ___

If Defendant is to serve sentence in jail or is given credit toward fine and costs, enter days credited below.

TOTAL DAYS: NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called in Lubbock County, Texas. The State appeared by her District Attorney.
Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

The State filed a motion to revoke Defendant's community supervision. After hearing the State's motion, Defendant's plea, the evidence submitted, and reviewing the record, the Court **GRANTS** the State's motion. The Court's record indicates that Defendant was previously convicted of a felony offense and punishment was assessed as indicated above. The record indicates the Court ordered imposition of Defendant's sentence of confinement suspended and placed Defendant on community supervision for **Five (5) Years**.

The Court **FINDS** Defendant has violated the conditions of community supervision as set out in the State's Amended Motion to Revoke Community Supervision as follows: **A,B,D,F,K(1&2),Q,V – See Attached**

Accordingly, the Court **ORDERS** the previous orders in this cause suspending imposition of sentence of confinement and placing Defendant on community supervision **REVOKED**. **(select one of the following)**

☒ The Court **ORDERS** Defendant punished in accordance with the judgment and sentence originally entered in this caused.

☐ Finding it to be in the interest of justice, the Court **ORDERS** Defendant punished in accordance with the reformed judgment and sentence indicated above.

Punishment options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the TDCJ-ID. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail – Confinement/Confinement in Lieu of Payment.** The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of Lubbock County, Texas on the date the sentence is to commence. Defendant shall be confined in the Lubbock County Jail for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY**. The Court **ORDERS** Defendant to proceed immediately to the Lubbock County Collections Department County. Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

The Court **ORDERS** Defendant's sentence EXECUTED.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

The Court further **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

Furthermore, the following special findings or orders apply:

Court Costs	$12.00	**APO Fee**	**$960.00**
Attorney Fees	$____	**Restitution**	**$140.00**

The Defendant waives any and all interest in any cash and or real property (real or personal, tangible or intangible) subject to any pending civil forfeiture case.

Signed and entered on this the 18th day of December, 2008

/s/ X Brad Cluded
Cecil G. Puryear
JUDGE PRESIDING

UNDER EXCHANGE
OF BENCHES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10835

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MONROE ACE SETSER

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas, Lubbock

(Filed Apr. 14, 2010)

ORDER:

IT IS ORDERED that the appellee's motion to supplement the record is **GRANTED**.

IT IS FURTHER ORDERED that the appellee's motion to strike portions of the appellee's brief is **GRANTED**.

/s/ Lyle W. Cayce

LYLE W. CAYCE
CLERK OF COURT
ENTER AT THE DIRECTION
OF THE COURT

EXHIBIT A

DSC5V * PUBLIC INFORMATION * 04-09-2010
PAGE 001 * INMATE DATA * 06:39:27
AS OF 04-09-2010

REGNO..: 34437-177 NAME: SETSER, MONROE ACE

RESP OF: 9-L
PHONE..: N/A FAX: N/A
RACE/SEX... : WHITE/ MALE
AGE: 36

ACTUAL RELEASE METH.: UNKNOWN
ACTUAL RELEASE DATE.: UNKNOWN

DSC5V * PUBLIC INFORMATION * 04-09-2010
PAGE 002 * INMATE DATA * 06:39:27
AS OF 04-09-2010

REGNO..: 34437-177 NAME: SETSER, MONROE ACE

RESP OF: 9-L
PHONE..: N/A FAX: N/A

HOME DETENTION ELIGIBILITY DATE: 09-03-2020

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT.

THE INMATE IS PROJECTED FOR RELEASE: 03-03-2021 VIA GCT REL

----CURRENT JUDGMENT/WARRANT NO: 010----

COURT OF
JURISDICTION..... : TEXAS, NORTHERN DISTRICT
DOCKET NUMBER..... : 5:08-CR-024-01-C
JUDGE..... : CUMMINGS
DATE SENTENCED/
PROBATION IMPOSED: . : 08-22-2008
HOW COMMITTED..... : US DISTRICT COURT COMMITMENT
PROBATION IMPOSED..... : NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$100.00	$00.00	$00.00	$00.00

RESTITUTION. . .: PROPERTY: NO
SERVICES: NO AMOUNT: $00.00

----------CURRENT OBLIGATION NO: 010----------

OFFENSE CODE. . . .: 383
OFF/CHG: 21:841(A)(1)&(B)(1)(A)(VIII) AND 18:2 PWITD 50 GRAMS OR MORE OF METHAMPHETAMINE AND AIDING AND ABETTING

SENTENCE
PROCEDURE .....: 3559 PLRA SENTENCE
SENTENCE IMPOSED/
TIME TO SERVE.....: 151 MONTHS
TERM OF SUPERVISION..: 5 YEARS
CLASS OF OFFENSE.....: CLASS A FELONY
DATE OF OFFENSE.....: 10-01-2007

DSC5V * PUBLIC INFORMATION * 04-09-2010
PAGE 003 * INMATE DATA * 06:39:27
OF 003 AS OF 04-09-2010

REGNO..: 34437-177 NAME: SETSER, MONROE ACE

RESP OF: 9-L
PHONE..: N/A FAX: N/A

----------CURRENT COMPUTATION NO: 010----------

COMPUTATION 010 WAS LAST UPDATED ON 04-05-2010 AT DSC AUTOMATICALLY

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS ARE INCLUDED IN CURRENT COMPUTATION 010: 010 010

DATE COMPUTATION BEGAN .....: 03-17-2010
TOTAL TERM IN EFFECT.....: 151 MONTHS
TOTAL TERM IN EFFECT
CONVERTED.. .....: 12 YEARS
7 MONTHS
EARLIEST DATE OF OFFENSE .....: 10-01-2007

TOTAL PRIOR CREDIT TIME .....: 0
TOTAL INOPERATIVE TIME .....: 0
TOTAL GCT EARNED
AND PROJECTED.. .....: 592
TOTAL GCT EARNED.....: 0
STATUTORY RELEASE
DATE PROJECTED: .....: 03-03-2021
EXPIRATION FULL TERM DATE....: 10-16-2022

PROJECTED SATISFACTION
DATE .....: 03-03-2021
PROJECTED SATISFACTION
METHOD.....: GCT REL

S0055 NO PRIOR SENTENCE DATA EXISTS FOR THIS INMATE

RELEASEE

[SEAL] **STATE OF TEXAS**

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

PARDONS AND PAROLE DIVISION
Certificate of Parole

Date of Issuance: 02/17/2010

Name	TDCJ #	SID #
SETSER,MONROE A	01546641	04622486

Legal county of residence Approved county of release
LUBBOCK

Location: Unit FB, TDCJ-ID

Cause#: 2007-418,142 2006-412,543

The Texas Department of Criminal Justice Institutional Division (TDCJ-ID) of the State of Texas has determined that said offender is eligible for Parole under the provisions of Chapter 308, Texas Gov't Code. THEREFORE, the Texas Board of Pardons and Paroles (Board) hereby orders that said offender be released under Parole and shall immediately report to the office indicted below for supervision.

CENTRAL COORDINATION UNIT
ATTENTION DETAINER ANALYST
8610 SHOAL CREEK BLVD.
AUSTIN, TX 78757
(512)406-5356

and shall be permitted to be at liberty in the legal custody of the Parole Division of the Texas Department of Criminal Justice but subject to the orders of the Board and the Texas Department of Criminal Justice Parole Division, and under the rules and conditions of Parole herein. The period of Parole shall be for a period equivalent to the maximum term for which the offender was sentenced less calendar time actually served on the sentence. The time to be served under Parole is also calculated as calendar time. The certificate shall become effective when eligibility requirements for Parole under chapter 308, Texas Gov't Code have been met or when Parole is ordered by the Board, and when all rules and conditions, including statutorily mandated, general and special conditions are agreed to by said offender.

STATUTORILY MANDATED CONDITIONS

Unless otherwise provided, I shall reside in the county in which I resided at the time I committed the offense for which I was sentenced to the Institutional Division or the county of the offense for which I was sentenced to the Institutional Division if I was not a resident of the State of Texas.

I shall demonstrate an educational skill level that is equal to or greater than the average skill level of students who have completed the sixth grade in a public school in the State of Texas.

I shall submit to testing for alcohol or controlled substances.

I shall not communicate directly or indirectly with the victim, go to or near the residence, place of employment, or business of the victim, or go to or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance.

I shall not intentionally or knowingly communicate directly or indirectly with, nor intentionally or knowingly go near a residence, school, place of employment, or business of the offense for which I was sentenced to the Institutional Division.

I shall reimburse the State of Texas for the costs of any Post-Secondary Educational Progress in which I participated in TDCJ.

Upon written instructions from my supervising officers

I shall participate in a drug or alcohol continuous of care treatment program.

I shall register as a sex offender under Chapter 62, Code of Criminal Procedure.

I shall not go in, on or within a distance specified by a parole panel of premises where children commonly gather, nor shall I supervise or participate in any Program that includes as participants or recipients,

persons who are 17 years of age or younger, and I shall attend psychological counseling as specified by my supervising officer.

I shall perform not less than 300 hours of community service at a service project designated by a parole panel.

SPECIAL CONDITIONS

D = Release to Detainer only. At any time that this condition is in effect, and to the extent directed by the supervising parole officer, I shall be released to the custody of the detaining agency; report to the parole division, as instructed, at all times while not in custody on the basis of the detainer; and report immediately to the parole division, as instructed, upon withdrawal or cancellation of this detainer.

L = I shall be assigned to the maximum level of supervision or supervision [illegible] until appropriate level of supervision is further established by subjective assessment instrument and supervision case classification

S = I shall submit to a substance (alcohol/ narcotics) treatment program which may include urinalysis monitoring, attendance of scheduled counseling program, driving restrictions or any of the related components as directed by the supervising parole officer.

S = Not unlawfully use drugs, narcotics, or controlled substances.

ISSUED BY ORDER OF THE BOARD OF PARDONS AND PAROLES AT AUSTIN, TEXAS ON THE 17TH DAY OF FEBRUARY, 2010.

/s/ Rissie Owens
RISSIE OWENS
BOARD OF PARDONS
AND PAROLES

If Parole is satisfactorily completed, maximum expiration date will be:

RELEASED TO DETAINING AGENCY AS PER ATTACHMENT

In consideration of the Parole granted as by the board, I do hereby accept such Parole. I recognize that my release is conditional based upon my performance of the following terms and conditions.

1. I shall upon release from the institution, report immediately, as instructed to my Parole Officer; thereafter, report as directed and follow all instructions from my Parole Officer.
2. I shall commit no offense against the laws of this state or of any other State or of the United States.
3. I shall reside in a specified place as approved by my supervising officer.
4. I shall not travel outside the State of Texas without the approval of my supervising officer.
5. I shall not unlawfully own, possess, use, sell, nor have under my control any weapon or illegal weapon.

6. I shall avoid persons or places of disreputable or harmful character.

7. I shall not enter into any agreement to act as "informer" or special agent for any law enforcement agency without specific written approval of the Parole Division Director or designee.

8. I shall abide by all Special Conditions imposed upon me by the Board.

9. General Provisions:

   A. I hereby agree to abide by all rules of Parole supervision imposed by Texas or the receiving state including, but not limited to, the requirement that I appear at any hearings or proceedings concerning alleged violations of Parole as required by the law of the receiving state, any state in which I may be found or the State of Texas. I further agree and consent that the receiving state, if I am under the Interstate Compact for Adult Offender Supervision, or any state wherein I may be found while on Parole or under Parole jurisdiction, may conduct such hearings as deemed necessary, proper or which may be required by law.

   B. In the event I am granted the privilege of residing in and being under the supervision of any other state or territory under the Interstate Compact for Adult Offender Supervision pursuant to Texas Government Code, Section 510-07 and/or rules enacted by the Interstate Commission on Adult Offender Supervision and if for any reason I may be

outside of the State of Texas in violation of the terms and conditions of parole supervision I hereby agree to waive extradition to the State of Texas from any other state or territory jurisdiction in or outside of the United States where I may be found. I further agree that I will not in any manner contest any effort by the State of Texas, the receiving state or territory or any other state or territory jurisdiction in or outside the United States, to return me to the State of Texas.

C. I shall pay, during the period of my supervision, any and all outstanding fines, court costs and fees adjudged against me, to the clerk of the court of conviction, and I agree to provide my Parole Officer with documentation verifying payment of said amounts. I shall pay a supervision fee for each month that I am required to report to a Parole Officer as instructed by my Parole Officer.

D. In the event I am placed in or allowed to reside in a halfway house or community residential facility, I hereby agree to go directly to and reside in the facility designated by the Parole Division until released by the Division. I shall abide by the rules of the facility and attend all required meetings. I shall not leave the physical confines of the facility and property thereof, except for traveling to and from work, or as authorized by facility rules. During my stay, I shall pay 25% of my gross income to the facility if required. I shall leave all keys to any motor vehicle that I

have use of with facility staff when the motor vehicle is not in use.

E. As required by the Board, I shall obtain and keep in my possession a Texas Department of Public Safety (DPS) Personal Identification Card or Driver's License. I shall present said identification to law enforcement or Texas Department of Criminal Justice officials upon request.

F. If I am released to a detainer and departed outside the international borders of the United States prior to the maximum expiration date shown on this Release certificate, I shall not enter the United States unlawfully. In the event that I gain lawful entry into the United States, I shall report immediately, as instructed to the office shown on this Release Certificate. If at any time prior to the maximum expiration date shown on this Release Certificate said detaining agency fails to exercise custody, I shall immediately upon release (within 24 hours) report as instructed to the office shown on this Release Certificate.

I HEREBY CERTIFY that I fully understand and agree to be bound by each of the conditions under which I am being released. I further understand and agree that a violation or refusal to comply with any of the conditions of supervision may be sufficient cause for revocation of supervision. I understand that when a warrant or subpoena is issued that the sentence time credit shall be suspended until a determination

is made in such case and such suspended time credit may be reinstated should supervision be continued. *I UNDERSTAND AND AGREE THAT WHILE UNDER SUPERVISION I REMAIN IN THE LEGAL CUSTODY OF THE PAROLE DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE SUBJECT TO THE ORDERS OF THE BOARD AND PAROLE DIVISION.*

AGREED AND SIGNED.

/s/ x Monroe A Setser — MAR 17 2010
MONROE A SETSER — Date

I hereby certify that these rules, regulations and conditions have been explained to the releasee and he/she has agreed to abide by rule upon release.

/s/ A Ayala — MAR 17 2010
Parole Division Representative — Date

Inmate Locator – Locate Federal inmates from 1982 to present

Name	Register #	Age-Race-Sex
1. MONROE ACE SETSER	34437-177	36-White-M

Release Date Actual or Projected	Location
03/03/2012	IN TRANSIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10835

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MONROE ACE SETSER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(Filed May 11, 2010)

Before: BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:

Defendant-Appellant Monroe Ace Setser appeals the district court's imposition of a federal sentence that runs consecutively to an undischarged state sentence. Because the imposition of a consecutive sentence is fully within the district court's authority, and because we conclude that the sentence is otherwise reasonable and not illegal, we find no error in the

district court's sentencing of defendant. Accordingly, we AFFIRM.

I. BACKGROUND

Monroe Ace Setser pleaded guilty to possession with intent to distribute 50 grams or more of methamphetamine and aiding and abetting. At the time he committed the instant offense, Setser was still serving a five-year term of probation in state court for a previous 2006 state offense. Additionally in 2007, Setser had been charged in state court with possession with intent to deliver a controlled substance – an offense that was directly related to the instant federal offense of conviction.

Following Setser's entry of a guilty plea, the federal district court sentenced Setser to 151 months of imprisonment. At the time of sentencing, the district court stated that the 151 months were to be served consecutively to any sentence imposed as a result of his 2006 state offense and concurrently with any sentence imposed pursuant to his 2007 state offense. Setser timely appealed his sentence, arguing that the district court's sentence was illegal since 18 U.S.C. § 3584 does not grant the district court the authority to impose a federal sentence consecutively to an undischarged state sentence.

Subsequent to the district court's imposition of the federal sentence, Setser's probation in his 2006 state case was revoked by the state court, and he was sentenced to five years of imprisonment. Additionally,

Setser was convicted of possession with intent to deliver a controlled substance in the 2007 state charge, and as a result, he was sentenced to ten years of imprisonment. The state court ordered that these two state sentences would run concurrently to one another.

On April 12, 2010, the United States moved pursuant to Fed. R. App. P. 10(e)(2)(C) & (e)(3) to supplement the record with documents showing that the Texas prison system released Setser and that he is now in the custody of the federal Bureau of Prisons ("BOP"). Consequently, after serving only two-and-a-half years in the state system on both of his 2006 and 2007 state sentences, Setser is now in BOP custody. Setser's Texas parole documents show that he was released from state custody on March 17, 2010. The BOP's "Public Information Inmate Data" sheet indicates that Setser's federal sentence began to run on March 17, 2010. The BOP did not award Setser any credit for the two-and-a-half years he spent in state custody.

II. Standard of Review

"A sentence is ultimately reviewed for 'unreasonableness.'" *United States v. Candia*, 454 F.3d 468, 472 (5th Cir. 2006) (quoting *United States v. Smith*, 440 F.3d 704, 705 (5th Cir. 2006)). "Under *Booker*, it is the sentence itself, including its consecutive nature, that is ultimately reviewed for reasonableness." *Id.* at 472-73 (quoting *United States v. Booker*, 543 U.S. 220, 261

(2005)). Here, where the Defendant-Appellant is only challenging the imposition of a consecutive sentence, and not the district court's application or calculation of the Guidelines themselves, "the appellate court should . . . consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also Candia*, 454 F.3d at 474 ("We have determined that unreasonableness is the standard of review applicable to a consecutive sentence imposed both within a properly calculated sentencing range and pursuant to the applicable guidelines for imposition of a consecutive sentence."). Accordingly, this Court reviews the reasonableness of the district court's imposition of a consecutive sentence for abuse of discretion.

III. Analysis

On appeal, Setser contends that the district court erred by relying on 18 U.S.C. § 3584 as authority to order his sentence to run consecutively to his undischarged state sentence in his 2006 state conviction. He acknowledges that this argument is foreclosed by the Court's decision in *United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir. 1991), *abrogated on other grounds by Candia*, 454 F.3d at 472-73, where this Court held that "[w]hether a sentence imposed should run consecutively or concurrently [to an undischarged state sentence] is committed to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a)."

Setser offers several arguments as to why this Court should now revisit its decision in *Brown*. First, Setser notes that the circuits are split on this issue,*

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* The Eleventh, Eighth, Tenth, ands have held that § 3584 authorizes district courts to order a federal sentence to run consecutively to an undischarged state sentence. *See United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993) ("[A] district court [has] the authority to impose a federal sentence consecutive to an unrelated, unimposed state sentence on pending charges."); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) ("[T]he authority to impose such a federal sentence to be served consecutively to a yet-to-be-imposed state sentence falls within the broad discretion granted to the court."); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995) (holding that "no language in section 3584(a) prohibit[s] a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed."); *United States v. Brown*, 920 F.2d 39 1212, 1216 (5th Cir. 1991) (holding that "whether a sentence imposed should run consecutively or concurrently is committed to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a)."). In contrast, the Second, Fourth, Seventh, Sixth, and Ninth Circuits have held that a federal district court does not have such discretion or authority. *Cf. United States v. Donoso*, 521 F.3d 144, 147 (2d Cir. 2008) (determining "that under 18 U.S.C. § 3584(a), the district court was not authorized to direct that the federal sentence run consecutively to [an undischarged] state sentence."); *United States v. Smith*, 472 F.3d 222, 225 (4th Cir. 2006) ("The plain language of this statute does not grant a district court authority to order that its sentence run consecutively to a future sentence."); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000) ("Neither § 3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his sentence must run consecutively to some sentence that may be imposed in the future."); *United States v. Quintero*, 157 F.3d 1038, 1039-40 (6th Cir. 1998) ("We hold that 18 U.S.C. § 3584(a) does not authorize district courts to order a sentence to be served consecutively to a

(Continued on following page)

and he contends that *Brown* does not comport with the text of 18 U.S.C. § 3584 or its legislative history. Finally, Setser contends that the sentencing factors in § 3553(a) and U.S.S.G. § 5G1.3 run contrary to *Brown*, as do considerations of comity.

Even if we were to find Setser's arguments compelling, we are bound by Brown's precedent as "[i]t is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision." *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). Thus, there are only two ways in which Brown's posture as binding precedent in this Court could change: 1) an intervening decision by the Supreme Court or 2) a superseding decision by this Court sitting en banc. The Supreme Court, to date, has issued no intervening decision. Further, this Court has recently declined the opportunity to reconsider *Brown* en banc.** Because *Brown*

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not-yet-imposed state sentence."); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991) (holding "[t]hat a federal court may not direct a federal sentence to be served consecutive to a state sentence not yet imposed. . . .").

** In *United States v. Garcia-Espinoza*, No. 08-10775, 2009 WL 1362199 at *1 (5th Cir. May 15, 2009) (unpublished), this Court rejected a defendant's challenge to his consecutive sentence, holding that his "challenge is foreclosed by our prior precedent." However, in light of the circuit split concerning a district court's discretion to order a federal sentence to run consecutively to an undischarged state sentence, Judge Owen and Judge Dennis, in their joint concurrence, recommended that the

(Continued on following page)

is the law of this Court, we conclude that the district court had the authority to – and therefore did not abuse its discretion by – imposing a consecutive federal sentence to a yet imposed state sentence.

Despite the district court's authority to issue a consecutive sentence, Setser argues that his consecutive sentence is unreasonable because he asserts that his federal sentence is now logically impossible to carry out – as a result of the state court's decision to run his two state sentences concurrently. Setser contends that either the consecutive or the concurrent sentence must be given priority, and that it is not clear from the record what the district court fully intended. Initially, Setser asserted that once he was transferred to federal custody, the BOP would not be able to correctly calculate his sentence as a result of this inherent ambiguity. Setser therefore requested that this Court declare his consecutive sentence unreasonable and either reverse and remand for resentencing, or strike the consecutive sentence and order that his 151 months be served concurrently to both state sentences. Finding no error in the district

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Court revisit the Brown holding en banc. *Id.* at *2. Yet when Garcia-Espinoza filed a motion for rehearing en banc, "[n]o member of the panel nor judge in regular active service on the court . . . requested that the court be polled" on a rehearing en banc. As a result, the Court denied the defendant-appellant's motion on April 13, 2009. Thus, given this Court's recent refusal to reconsider *Brown* en banc, any future reversal of the Court's decision in *Brown* is best left to the discretion of our Supreme Court.

court's sentence, we decline to reverse or remand for re-sentencing.

A sentence may be illegal if it is "'ambiguous with respect to the time and manner in which it is to be served, is internally self-contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the statute or is a sentence which the judgment of conviction did not authorize.'" *United States v. Dougherty*, 106 F.3d 1514, 1525 (10th Cir. 1997) (quoting *United States v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991)). "Criminal sentences must 'reveal with fair certainty the intent of the court to exclude any serious misapprehensions by those who must execute them.'" *United States v. Garza*, 448 F.3d 294, 302 (5th Cir. 2006) (quoting *United States v. Daugherty*, 269 U.S. 360, 363 (1926)). In the present case, however, there is nothing plainly self-contradictory or uncertain about the sentence in and of itself. Quite to the contrary, the federal sentence alone is quite clear. Any ambiguity in the district court's sentence was not introduced until after the state court ordered Setser's two state sentences to run concurrently.

It is important to note that Setser's "contention that the sentence is 'impossible' to fulfill stems not from an inherent flaw on the face of the court's sentencing papers, . . . but from the very practical problems that arise in carrying out overlapping state and federal sentences in a dual sovereignty." *United States v. Cibrian*, 2010 WL 1141676, *5 (5th Cir., Mar. 14, 2010) (unpublished). That is, in *Cibrian*,

this Court noted that "[t]he irreconcilability of [a defendant's] federal and state sentences is a well-documented practicality of our system of contemporaneous jurisdiction." *Id.* at 7. As a result of this dual system of jurisdiction, in some instances – as in here – it is "the federal sentence [that may be] partially foiled, [and] in other cases, it is the state sentence that suffers the intrusion." *Id.* A subsequently issued state court sentence, therefore, does not render an otherwise legal federal sentence illegal.

Furthermore, now that Setser is in the custody of the BOP, and the BOP has determined that Setser is not entitled to any credit for the time he spent in state custody, we are currently without the power or the authority to order the BOP to calculate Setser's sentence in any certain manner. Notably, "the United States Supreme Court [has] held that § 3585(b) does not authorize a . . . court to compute credit for time spent in official detention at sentencing, but [rather,] credit awards are to be made by the Attorney General, through the Bureau of Prisons, after sentencing." *United States v. Dowling*, 962 F.2d 390, 393 (5th Cir. 1992) (citing *United States v. Wilson*, 503 U.S. 329 (1992)). In the event that a prisoner feels he has been improperly refused credit for time he has served in state custody, the prisoner must first "seek administrative review of the computations of [his] credit, and, once [he has] exhausted [his] administrative remedies, [the] prisone[r] may only *then* pursue judicial review of these computations." *Id.* (citing *Wilson*, 503 U.S. at 335; 28 C.F.R. §§ 542.10-542.16

(1990)) (internal citations omitted); *see also Lundy v. Osborn*, 555 F.2d 534, 534-35 (5th Cir. 1977) ("[G]rievances of prisoners concerning prison administration should be presented to the Bureau [of Prisons] through the available administrative channels. Only after such remedies are exhausted will the court entertain the application for relief in an appropriate case.").***

Thus, although his appeal began as a challenge to the ambiguity regarding how the BOP might interpret and carry out the district court's sentence, the BOP has subsequently interpreted and carried out the sentence. The BOP's interpretation of Setser's sentence, however, is not properly before this Court. At this juncture, should Setser wish to contest the BOP's denial of credit for the time he served in state custody, Setser must first pursue his administrative remedies pursuant to 28 C.F.R. §§ 542.10-542.16 (2002).

*** This Court has previously dismissed a prisoner's appeal of the BOP's interpretation and calculation of his sentence if the prisoner has failed to exhaust his administrative remedies. That is, once a prisoner has exhausted his administrative remedies, he may "fil[e] a pro se petition for habeas relief under 28 U.S.C. § 2241, challenging the BOP's computation of his sentence. . . ." *Dominguez v. Williamson*, 251 F.3d 156, at *2 (5th Cir. 2001). However, "this court has determined that a § 2241 petitioner must first exhaust his administrative remedies through the Bureau of Prisons." *Rourke v. Thompson*, 11 F.3d 47, 49 (5th Cir. 1993).

IV. Conclusion

For the aforementioned reasons, we conclude that the district court's imposition of a consecutive sentence was well within the district court's authority pursuant to 18 U.S.C. § 3584, and as a result, the district court's sentence was not illegal or unreasonable. Accordingly, we find that the district court did not abuse its discretion, and we AFFIRM. All pending motions are denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10835

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MONROE ACE SETSER

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas, Lubbock

ON PETITION FOR REHEARING EN BANC

(Filed Aug. 5, 2010)

(Opinion 5/11/2010, 5 Cir., ___, ___ F.3d ___)

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled

on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 13, 2011

Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Monroe Ace Setser
v. United States
No. 10-7387
(Your No. 08-10835)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

No. 10-7387

In The Supreme Court of the United States

MONROE ACE SETSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I

Does a district court have authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence?

II

Is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Setser*, 607 F.3d 128 (5th Cir. 2010). J.A. 54-64. The district court did not issue a written opinion, but the sentencing transcript and written judgment are reprinted in the joint appendix. J.A. 14-27.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010, and a timely petition for rehearing en banc was denied on August 5, 2010. The petition for writ of certiorari was filed on November 2, 2010, and granted on June 13, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTE

A district court's authority to impose concurrent or consecutive terms of imprisonment is governed by 18 U.S.C. § 3584(a):

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except

> that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT OF THE CASE

This case presents the related questions of whether a court may order a federal sentence to run consecutively to a state sentence that does not yet exist, and whether such an order should be vacated as unreasonable when it is contradicted by another term in the same federal judgment.

Interaction of Federal and State Sentences

A defendant subject to multiple terms of imprisonment will serve them concurrently or consecutively. When a defendant is subject to multiple federal sentences, the United States Bureau of Prisons ("BOP") aggregates the sentences as though the defendant were subject to a single term of imprisonment. *See* 18 U.S.C. § 3584(c).

When a defendant is subject to both federal and state sentences, the matter is more complicated

because multiple sovereigns are involved. A defendant will first serve the sentence of the sovereign that maintains primary custody over him. Upon completion of that sentence, the defendant will then serve the sentence of the sovereign with secondary jurisdiction. Primary custody is acquired by arrest and relinquished by bond, acquittal, dismissal of charges, parole, probation or discharge of sentence. *See Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922); *United States v. Poole*, 531 F.3d 263, 271 (4th Cir. 2008); *United States v. Cole*, 416 F.3d 894, 896-97 (8th Cir. 2005); *United States v. Warren*, 610 F.2d 680, 684-85 (9th Cir. 1980).

A defendant in primary *federal* custody will generally serve his federal sentence first. If state authorities then count the federal time toward his state sentence, the federal and state terms will effectively run concurrently. If state authorities do not do so, the terms will run consecutively.

A defendant in primary *state* custody will generally serve his state sentence first. In order to achieve concurrent service of the federal and state sentences, BOP must designate the state institution as the place for service of the federal sentence. 18 U.S.C. § 3621; BOP Program Statement No. P5160.05 § 9(b)(1) (January 16, 2003). If BOP does so, then the defendant's federal sentence starts on the date of federal sentencing, and all subsequent time in state custody is counted toward his federal term of imprisonment. 18 U.S.C. § 3585. If BOP does not designate the state facility for service of the federal sentence, then the

defendant's sentence will start on the day he completes service of his state sentence and enters federal custody.

In general, BOP has discretion to decide whether to designate the state facility for service of the federal sentence, and the district court can provide only a non-binding recommendation. 18 U.S.C. § 3621. However, under § 3584(a), the district court has authority to compel a consecutive or concurrent sentence if multiple federal sentences are imposed at the same time or if the defendant is "already subject to an undischarged term of imprisonment." Where a defendant is in primary state custody, a concurrent order under § 3584(a) requires BOP to count the time in state custody toward the federal sentence and a consecutive order forbids BOP to count the state time against the federal sentence.

BOP typically designates the state facility for service of the federal sentence when the district court orders or recommends concurrent service. BOP Program Statement No. P5160.05 § 9(b)(1). Sometimes BOP effects a concurrent sentence even when the judgment is silent. BOP Program Statement No. P5160.05 § 9(b)(4-5). Courts have held that BOP may retroactively designate the state institution to effect a concurrent sentence even after the defendant has been released from state custody into federal custody. *See, e.g., Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990).

Monroe Setser's Case

On October 1, 2007, Monroe Setser was serving a five-year term of probation for a 2006 state offense ("2006 state probation case") when Lubbock, Texas, police officers stopped his car. The officers found methamphetamine, cocaine, marijuana, and two pistols. Mr. Setser's resulting arrest led to prosecutions in both state and federal court. State authorities charged him with possession of methamphetamine with intent to distribute ("2007 state drug case") and filed a motion to revoke his state probation. Before those state cases were resolved, federal authorities interrupted the proceedings by filing a writ of habeas corpus *ad prosequendum*, which brought Mr. Setser into federal custody.[1] J.A. 1; S.J.A. 70. He was indicted for the federal offenses of possession of methamphetamine with intent to distribute, possession of a firearm by a felon, and possession of a firearm in furtherance of a drug trafficking crime. J.A. 11-13. The drug distribution charge was based upon the same conduct underlying the state drug case. S.J.A. 70, 78.

Federal Proceedings

Mr. Setser pleaded guilty to the federal drug charge, and the government agreed to dismiss the

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[1] The State of Texas maintained primary custody of Mr. Setser until his eventual parole from state prison, even while he was in the physical custody of federal authorities for the district court proceedings.

gun-related counts. S.J.A. 70, 71. The Presentence Investigation Report ("PSR") calculated the advisory guideline range as 121-151 months' imprisonment. S.J.A. 87. The PSR noted that the 2007 state drug case remained pending and was "directly related to the instant federal offense of conviction." S.J.A. 87. It concluded that "the court should order any sentence to be imposed for the instant federal offense to be served concurrently with any sentence that may be imposed" in the 2007 state drug case. S.J.A. 87. The PSR also noted that a motion to revoke was pending in Mr. Setser's 2006 state probation case. S.J.A. 87. It concluded that "the court may wish to impose the federal sentence to run concurrently with, partially concurrently with, or consecutive to any sentence to be imposed in the probation revocation." S.J.A. 87.

Mr. Setser objected to the PSR's suggestion that the court could order the federal sentence to run consecutively "to the as yet unimposed state sentence" from the 2006 state probation case. S.J.A. 93. He acknowledged the Fifth Circuit's precedent which held the district court had such authority, but noted a circuit split on the question. S.J.A. 93. Mr. Setser renewed his objection at sentencing, but the government responded that the issue was foreclosed by Fifth Circuit precedent. J.A. 22-23. The district court overruled the objection and sentenced Mr. Setser to 151 months' imprisonment. J.A. 15-16, 23, 25. The court ordered its sentence to be served consecutively to any sentence that might be imposed in the 2006 state probation case and concurrently with any sentence that

might be imposed in the 2007 state drug case. J.A. 16, 25. Mr. Setser timely appealed. J.A. 4. The government neither objected to the concurrent order nor cross-appealed.

State Proceedings

While the case was on direct appeal, federal authorities returned Mr. Setser to state custody. He pleaded guilty in the 2007 state drug case, and the state court revoked his probation in the 2006 case. The state court sentenced Mr. Setser to serve five years' imprisonment in the 2006 state probation case and ten years' imprisonment in the 2007 state drug case. J.A. 29-30, 35-36. Further, the state court ordered these sentences to run concurrently with each other. J.A. 29-30, 35-36. Under Texas law, the "concurrent" orders also applied to the federal sentence. *See Ex parte Spears*, 235 S.W.2d 917, 917-18 (Tex. Crim. App. 1951) (noting that a state sentence runs concurrently with a previously-imposed federal sentence unless the trial court orders consecutive service). *See also Cook v. State*, 824 S.W.2d 634 (Tex. App. 1991) (holding that present version of TEX. CODE CRIM. PROC. art. 42.08 gives Texas courts authority to order a state sentence consecutively to or, by implication, concurrently with previously imposed federal sentences).

Mr. Setser remained in state custody until he was paroled on March 17, 2010. J.A. 44, 53. He then entered exclusive federal custody, where he remains.

BOP has not credited him for any time spent in state custody even though the federal district court ordered its sentence to run concurrently with the sentence in the 2007 state drug case. J.A. 44.

Federal Appeal

Mr. Setser asserted two claims at the Fifth Circuit: 1) that the district court had no authority to order its sentence served consecutively to a future state sentence; and 2) that the federal sentence was impossible to fully implement, and therefore was unreasonable. The circuit court affirmed. It held that it was bound to follow its precedent in *United States v. Brown*, 920 F.2d 1212 (5th Cir. 1991), and rejected the unreasonableness claim. J.A. 54-64.

SUMMARY OF THE ARGUMENT

I. The district court had no authority to impose a consecutive term of imprisonment.

Congress has authorized district courts to issue consecutive sentencing orders in two circumstances: when "multiple terms of imprisonment are imposed on a defendant at the same time," or when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." 18 U.S.C. § 3584(a). The statute provides no authority to order a federal sentence to run consecutively to a state term of imprisonment that has not yet been imposed. That is, a federal court may order

consecutive service as to a term of imprisonment imposed before the federal sentence, or at the same time as the federal sentence, but not after the federal sentence.

This reading comports with the plain language of the statute. It honors Congress's choice of the phrase "already subject to," which requires an existing term of imprisonment, not a future one. And it honors Congress's choice of the word "undischarged" to modify the phrase "term of imprisonment." The word "undischarged" implies that the relevant term of imprisonment has begun, or at least that it already exists.

This reading also gives meaning to each sentence of § 3584(a). The first sentence of the statute contains limitations on the district court's authority to impose a concurrent or consecutive sentence. Important canons of statutory construction counsel against casting those limitations aside. Likewise, the principle that all portions of a statute should be construed as a functional whole supports this view. Section 3584(b) requires the district court to consider certain statutory factors when deciding whether to order consecutive service of two terms of imprisonment. That mandate cannot be fulfilled with respect to an unknown and unknowable state sentence.

Legislative history and the work of the Sentencing Commission further confirm the limits on the district court's consecutive sentencing authority. The relevant Senate Judiciary Report does not contemplate extension of this authority to future state sentences. Similarly, the Sentencing Commission construed § 3584(a)'s

phrase "undischarged term of imprisonment" to include only previously imposed terms of imprisonment.

Section 3584(a) clearly articulates the district court's consecutive sentencing authority. Because Congress spoke directly to this subject, this case presents no opportunity to examine the contours of a district court's inherent authority.

Any contrary application of the statute would be unworkable and arbitrary. If a district court has the power to issue orders relative to sentences that do not exist, its orders can become impossible to implement. Mr. Setser's case illustrates this problem. The district court ordered its sentence run consecutively to one future state term of imprisonment, but concurrently with a different future state term of imprisonment. Yet the state court ultimately ordered the two state terms to run concurrently with each other, so the federal sentence became impossible to fully implement.

Furthermore, there is no textual reason to distinguish between a district court's power to order a consecutive sentence with respect to a future *state* term of imprisonment and its power to do so with respect to a future *federal* term of imprisonment. The statute simply does not distinguish between state and federal sentences. Yet § 3584(a) plainly authorizes a second federal court to run its sentence concurrent with an earlier federal sentence. Accordingly, if the statute authorizes a district court to order its sentence to run consecutively to a future federal sentence, it invites conflicting federal court orders.

Federalism and comity concerns likewise support the limits on federal consecutive sentencing authority. An anticipatory consecutive sentencing order deprives the state court of the power to determine the effect of its own judgment. It also instructs BOP to dishonor an otherwise valid state concurrent sentencing order. This practice should be disfavored in the absence of explicit Congressional authorization.

Neither Mr. Setser's probationary term nor the pending motion to revoke that probation can reasonably be considered an undischarged term of imprisonment within the meaning of § 3584(a). The district court therefore lacked authority to issue the consecutive sentencing order.

II. Alternatively, inclusion of the consecutive order resulted in an unreasonable sentence.

The district court ordered its sentence to run concurrently with any sentence imposed in the 2007 state drug case but consecutively to any sentence imposed in the 2006 state probation case. The state court later ordered these two sentences to run concurrently with each other, effectively rendering them a single term of imprisonment. The district court's judgment thus cannot be implemented; the federal sentence cannot run both concurrently with, and consecutively to, the single term of imprisonment resulting from the state sentences. There is no possible application of this

judgment that would not violate some provision of the judgment.

Impossible sentences are unreasonable sentences. Such sentences fail to provide the requisite level of certainty and fail to exclude "any serious misapprehensions by those who must execute them." *United States v. Daugherty*, 269 U.S. 360, 363 (1926). Such sentences, moreover, cannot reasonably be said to achieve the goals specified in 18 U.S.C. § 3553(a).

Mr. Setser's sentence was based upon a false assumption that the federal sentence could run concurrently with one state sentence but consecutively to the other. The court of appeals knew that the assumption turned out to be false but upheld the sentence anyway. This was reversible error.

III. The proper remedy is to strike the consecutive term of the judgment.

The consecutive order should be stricken from the judgment. The government has never challenged the concurrent order. Thus, the appropriate relief under the party presentation principle would leave the concurrent order undisturbed while striking the consecutive order.

ARGUMENT

I. The district court had no authority to impose a consecutive term of imprisonment.

A district court has the authority to order its sentence served consecutively to any other term of imprisonment imposed at the same time or to any sentence of imprisonment the defendant is already serving. 18 U.S.C. § 3584(a). But as to terms of imprisonment which do not exist, a district court has no statutory or inherent authority to order consecutive service.

A. A federal district court's consecutive sentencing authority does not extend to future state sentences.

1. The plain text of 18 U.S.C. § 3584(a) does not authorize a district court to order a sentence to run consecutively to a future state sentence.

Statutory analysis begins with the plain language. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989). The authority to impose a consecutive or concurrent sentence is found in 18 U.S.C. § 3584(a):

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except

> that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

The statute accomplishes two things. Its first sentence authorizes the district court to order concurrent or consecutive service when multiple terms of imprisonment are imposed at the same time or when the defendant is already subject to an undischarged term of imprisonment. In its second and third sentences, it provides default principles for interpreting the federal judgment if the court remains silent on the consecutive or concurrent question. This constitutes the full reach of the statute. It does not authorize a district court to order a federal sentence to run consecutively to a *future* state sentence.

a. The statute's first sentence grants consecutive sentencing authority only as to simultaneously-imposed and already-imposed sentences.

The statute's plain language confers only limited authority on a sentencing court. The clause authorizing a consecutive order when multiple terms of

imprisonment are imposed "at the same time" is not applicable here. The question here is whether a defendant who might be facing a future state sentence is one "who is already subject to an undischarged term of imprisonment." Textual analysis demonstrates that the answer is no.

"[W]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). Two word choices made by Congress resolve any dispute as to the statute's scope. First, the grant of consecutive sentencing authority applies to one who is "already subject to" to a prison term. "Already" is consistently defined to mean "by or before the given or implied time." WEBSTER'S NEW WORLD DICTIONARY 40 (2d College ed. 1984); *see also* THE RANDOM HOUSE COLLEGE DICTIONARY REVISED EDITION 39 (1988) ("already . . . *adv.* 1. Previous to a given or implied time . . . "). The use of the qualifying word "already" limits the statute's reach to existing sentences – those to which a defendant is subject on or before the date of federal sentencing.

"Subject to" possesses a range of meanings in common usage. *See* THE RANDOM HOUSE COLLEGE DICTIONARY REVISED EDITION 1308 (1988) ("subject . . . *adj.* . . . 13. being under the dominion rule, or authority of a sovereign, state, etc. . . . 14. open or exposed . . . 16. being under the necessity of undergoing something . . . "). It likewise has an open-ended use in its legal sense. *See* BLACK'S LAW DICTIONARY 1425 (6th ed. 1990) ("subject to. liable, subordinate,

subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for."). Yet the word "already" suggests that Congress intended to reach those defendants facing a prison term that had been previously established by a discrete event. Thus, a defendant who has merely been charged is not "already subject to" a term of imprisonment within the meaning of the statute.

Second, Congress specified "undischarged" terms of imprisonment, which indicates that the term of imprisonment has been imposed. Indeed, construing the word "undischarged" as it appears in the applicable Sentencing Guidelines, federal courts have concluded that it does not include unrevoked terms of parole or supervised release. *See United States v. Turnipseed*, 159 F.3d 383, 387 (9th Cir. 1998); *United States v. Blackwell*, 49 F.3d 1232, 1241 (7th Cir. 1995); *United States v. Ogg*, 992 F.2d 265, 266 (10th Cir. 1993). To describe a term of imprisonment that has not even been imposed as "undischarged" is like saying that a race is "unfinished" when nobody has even decided whether to have a race. If no term of imprisonment exists, there is nothing to discharge. A defendant is thus "already subject to an undischarged term of imprisonment" only if another term has been imposed at or before the time of federal sentencing.

Where the plain text yields a clear answer, further inquiry is unnecessary. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981). The plain text of § 3584(a) leads to the conclusion that a district

court's consecutive sentencing authority reaches existing state sentences, but does not extend to future state sentences.

b. The statute's second and third sentences provide no additional consecutive sentencing authority.

While the first sentence of § 3584(a) provides consecutive sentencing authority, the second and third sentences establish default rules for interpreting a silent judgment. When terms of imprisonment are imposed at the same time, they run concurrently unless a statute mandates otherwise or "the court orders" consecutive service. When terms of imprisonment are imposed at different times, they run consecutively "unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a).

The third sentence is the only one applicable to cases involving state terms of imprisonment, which are necessarily imposed at a different time than the federal term of imprisonment. This part of the statute does not broaden the class of cases in which a district court may issue a consecutive order. Rather, it establishes an applicable rule when the court *could have* issued a concurrent or consecutive sentencing order but did not do so. It does not purport to enlarge the grant of authority already defined in the first sentence of the statute.

The third sentence cannot be read as an independent grant of power. "Over and over [the Court

has] stressed that 'in expounding a statute, it must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850)). Rather, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The default principles of the second and third sentences immediately follow the grant of authority in the first sentence, and they all must be read together. A natural reading of the entirety of § 3584(a) shows that the default principles apply only when the court is otherwise empowered to issue a concurrent or consecutive order, but has remained silent.

This understanding is reinforced by the tight parallelism present in the structure of § 3584(a). The first sentence of § 3584(a) describes two situations in which the district court has the authority to order a concurrent or consecutive term of imprisonment. Unquestionably, the second sentence then announces a default principle pertaining to the first of these circumstances: cases where two terms of imprisonment are imposed at the same time. The third sentence continues this pattern, stating a default principle for the second of those circumstances. Nothing moves the reach of the statute to cases involving future terms of imprisonment.

Ordinary conventions of the English language suggest the same. Sentences follow one another when they pertain to a common subject, and it is not necessary to constantly restate the limited context in which they operate. It is not necessary, in other words, to restate in the third sentence the restrictive clause "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." This limitation is implied by the placement of the sentence within the statute. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. at 809 (rejecting interpretation of a statutory object that was "not inconsistent with the language of that provision examined in isolation," because "statutory language cannot be considered in a vacuum.").

This Court, moreover, has long recognized that "general words must . . . be limited . . . to those objects to which the legislature intended to apply them." *United States v. Palmer*, 16 U.S. 610, 631 (1818). It has thus repeatedly held that context may restrict the scope of statutory terms, even when they are preceded by an expansive modifier such as "any." *See United States v. Palmer*, 16 U.S. at 631 ("any person" in capital piracy statute refers only to persons owing allegiance to the United States); *Small v. United States*, 544 U.S. 385, 388 (2005) ("any court" in context means only domestic courts). Here, the phrase "multiple terms of imprisonment imposed at different times" is not preceded by an expansive modifier such as "any" or "all." There is accordingly even greater reason to understand that phrase in the context

established by § 3584(a)'s first sentence: cases where two terms of imprisonment are imposed at the same time, or where a federal defendant is already subject to an undischarged term. Indeed, it would make no sense for Congress to delineate the two circumstances in which consecutive sentences are authorized if its intent was to extend that authority to any sentence imposed at any future time.

2. Important canons of statutory construction support this conclusion.

The canon against surplusage confirms that district courts cannot reach future state sentences. It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation omitted). The first sentence of the statute sets plain parameters on the authority to order a consecutive sentence. If district courts may order consecutive service as to *any* sentence, even one not yet imposed, the limitations in the first sentence of the statute are superfluous. Congress included the limitations of the first sentence intending them to have effect.

The same conclusion obtains upon considering the canon of *expressio unius exclusio alterius*. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). This canon applies "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

Section 3584(a) permits consecutive sentencing with respect to terms of imprisonment imposed *before* a federal sentencing or *at the same time as* a federal sentencing. It is silent concerning terms of imprisonment imposed *after* a federal sentencing. The specific grant of authority in two of three possible circumstances implies a deliberate withholding of authority in the third circumstance, further confirming that district courts lack the authority to impose consecutive sentences with respect to terms of imprisonment imposed after the federal sentencing

The broader context of § 3584 confirms the absence of authority as to future terms of imprisonment. A court must, if possible, interpret a statute so that all parts of it comprise a "harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)). This rule supports Mr. Setser's reading of § 3584(a). Section 3584(b) requires the district court to consider the factors set forth in 18 U.S.C. § 3553(a) when choosing a concurrent or consecutive term. But the court cannot comply with

the mandates of § 3584(b) and § 3553(a) when future sentences are at issue because it does not know what the total sentence length will be. It cannot know whether the aggregate sentence will be greater than necessary to achieve the purposes of deterrence, incapacitation, rehabilitation, and respect for the law. *See* 18 U.S.C. § 3553(a)(2)(A). Certainly, it cannot know whether an aggregate sentence of unknown length advances or frustrates the need to avoid unwarranted disparity. *See* 18 U.S.C. § 3553(a)(6). To harmonize subsections (a) and (b) of § 3584, consecutive sentencing authority must be restricted to previously-imposed or simultaneously-imposed sentences.

3. The legislative history of § 3584 supports Mr. Setser's reading.

Legislative history may be used to shed light on the statute's meaning. *See Exxon Mobil Corp. v. Allapath Servs., Inc.*, 545 U.S. 546, 568 (2005). Among sources of legislative history, committee reports are the most likely to provide information about Congressional intent. *See Garcia v. United States*, 469 U.S. 70, 76 (1984). Section 3584(a) was passed with the sentencing reform provisions of the Comprehensive Crime Control Act. The Senate Judiciary Committee produced the most detailed explanation of the bill's intent on this Section. *See* S. REP. NO. 98-225 at 125-28 (1983).

The Senate Judiciary Committee's report indicates that Congress was concerned with previously

imposed state sentences. *See* S. REP. NO. 98-225 at 127 & n.314. The report refers only to situations in which two federal terms of imprisonment are imposed at the same time, or in which a defendant is already serving a state sentence. *See* S. REP. NO. 98-225 at 126 ("Proposed 18 U.S.C. 3584(a) provides that sentences to multiple terms of imprisonment may with one exception be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed *while the defendant is serving another one.*") (emphasis added).

There is absolutely no suggestion that Congress intended either to permit or to require consecutive sentencing with respect to future state terms of imprisonment. S. REP. NO. 98-225 at 125-28. Indeed, the only circuits to consider legislative history have concluded it demonstrates no intention to reach future terms of imprisonment. *See United States v. Clayton*, 927 F.2d 491, 492 (9th Cir. 1991) ("[T]he legislative history discussing the section indicates that Congress contemplated only that federal sentencing be consecutive to state convictions for which the defendant was already sentenced."); *United States v. Donoso*, 521 F.3d 144, 147 (2d Cir. 2008) ("The legislative history of the statute demonstrates, moreover, that in enacting § 3584(a) Congress was concerned with the imposition of a federal sentence on a defendant who was already serving either a federal or state sentence.").

4. The Sentencing Commission recognizes that a defendant is "subject to an undischarged term of imprisonment" only if he has already been sentenced to prison.

Congress charged the Sentencing Commission with the duty to promulgate sentencing guidelines. *See* 28 U.S.C. § 994(a). More specifically, those guidelines must include criteria for deciding whether multiple terms of imprisonment should be served concurrently or consecutively. *See* 28 U.S.C. § 994(a)(1)(D).

The Commission's instructions for applying § 3584(a) to undischarged sentences are found in USSG § 5G1.3. *See* USSG § 5G1.3, comment. (backg'd). Guideline 5G1.3 reflects the Commission's understanding that a defendant is "subject to an undischarged term of imprisonment" only if another term of imprisonment has already been imposed. The three subsections exhaust the universe of possible undischarged terms, and each of them refers exclusively to previously imposed sentences of imprisonment. Subsection (a) calls for a consecutive sentence if the defendant committed the federal offense while he "was serving" another sentence or "after sentencing" for another offense. USSG § 5G1.3(a). Subsection (b) calls for a concurrent sentence if the other term of imprisonment "resulted from" an offense that was relevant conduct. USSG § 5G1.3(b). And subsection (c) applies "[i]n any other case involving an undischarged term of imprisonment." The text of this catch-all provision demonstrates that an "undischarged

term" is a "*prior* undischarged term of imprisonment." USSG § 5G1.3(c), p.s. (emphasis added). The district court is instructed "to achieve a reasonable punishment for the instant offense." USSG § 5G1.3(c), p.s. That objective is impossible to achieve if the district court is ignorant of the aggregate length of imprisonment.

In the guideline commentary, the undischarged sentence is always described as one previously imposed. Moreover, the commentary presumes the district court to know both the length and the nature of the undischarged sentence. For example, the Commission encourages the district court to consider "[t]he type . . . and length of the *prior* undischarged sentence," "[t]he time *served* on the undischarged sentence," and "[t]he fact that the prior undischarged sentence *may have been imposed* in state court rather than federal court, or at a different time before the same or different federal court." USSG § 5G1.3, comment. (n.3(A)(ii)-(iv)) (emphases added). Probation revocations are addressed in note 3(C), which applies only if the defendant was on probation "at the time of the instant offense and *has had* such probation . . . *revoked*." USSG § 5G1.3, comment. (n.3(C)) (emphasis added).

In short, the Sentencing Commission describes every possible case in which a defendant could be "subject to an undischarged term of imprisonment," and in every case the defendant has already been sentenced to prison. The Sentencing Commission's interpretation of § 3584(a) should not lightly be cast

aside. The Commission is an expert body, composed of persons with a deep familiarity with the federal justice system. *See Rita v. United States*, 551 U.S. 338, 347-49 (2007).

B. The district court has no inherent authority to circumvent the limitations of § 3584(a).

This case presents no opportunity to explore the existence or contours of a district court's extra-statutory or inherent sentencing authority. The Eighth Circuit held that the statute does not prohibit a consecutive order as to a future term of imprisonment, and that such an order could properly flow from a district court's "broad discretion." *See United States v. Mayotte*, 249 F.3d 797, 798-99 (8th Cir. 2001). This cannot be correct for two reasons. First, this expansive view of inherent authority would render the first sentence in § 3584(a) superfluous, and would ignore Congress's decision to exclude future sentences from the scope of the district court's consecutive sentencing authority. Second, with the exception of § 3584(a), Congress has committed the power to designate state facilities as the place for service of a federal sentence to BOP, not to district courts.

Congress crafted § 3584(a) carefully. The statute permits a district court to order consecutive or concurrent service when it possesses all of the relevant information regarding the other sentence, but it withholds that authority when the other sentence has

not yet been imposed. In that circumstance, the final decision belongs to BOP after all of the relevant information is received. This Court should not rely upon extra statutory authority to disrupt that carefully crafted scheme.

C. Mr. Setser's reading produces the only logical rule.

The statute produces a logical, workable rule only if the district court's consecutive sentencing authority is limited to existing terms of imprisonment. Any contrary rule produces grave problems of administration and arbitrary outcomes. First, if district courts are empowered to compel a consecutive sentence even as to terms of imprisonment that do not yet exist, they will be blind to the total punishment. Reserving the consecutive versus concurrent question for subsequent decision-makers avoids this problem in the large majority of cases.

Second, the text of § 3584(a) does not distinguish between future *state* and future *federal* sentences. Accordingly, if § 3584(a) permits a consecutive order with respect to a future *state* sentence, then it also permits a consecutive order with respect to a future *federal* sentence. This would make it possible for two federal courts to impose conflicting orders. The second federal court, after all, would plainly enjoy the statutory power to impose a concurrent sentence, notwithstanding an earlier consecutive order, since this second term of imprisonment would be one "imposed

on a defendant who is already subject to an undischarged term of imprisonment." § 3584(a). Thus, if district courts may impose consecutive sentencing orders as to future terms of imprisonment, the statute invites conflicting federal orders. Such conFlicts have in fact occurred. *See United States v. Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008) (reversing such an order).[2]

Third, in cases where the defendant ultimately becomes subject to multiple state sentences, the federal court will not always know whether those sentences will run concurrently or consecutively to each other. As this case demonstrates, a federal court may compel consecutive service with respect to one future state sentence and concurrent service with respect to another future state sentence. If the state court subsequently runs these two state sentences concurrently with each other, the result will be an impossible sentence. The federal sentence cannot begin at the conclusion of one state sentence and the beginning of another state sentence if those two state sentences begin at the same time.

Finally, it would be irrational for Congress to mandate that all defendants in Mr. Setser's circumstance be subjected to consecutive terms.[3] Under this

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[2] The outcome in *Quintana-Gomez* was not grounded in the text of § 3584(a).

[3] This reading would require the Court read the third sentence of the statute to mandate consecutive service in *any* case involving a silent judgment where multiple terms of

(Continued on following page)

reading, every defendant in primary state custody would receive consecutive sentences if sentenced first by the federal court. The accident of the defendant's order of arrest, and the order of his sentencing, would then combine to produce mandatory consecutive service of federal and state sentences. If the defendant was arrested by state authorities but sentenced first in federal court, this reading would require consecutive service even if the federal and state charges were for identical conduct. But if he was arrested by federal authorities, or sentenced first by a state court, then he could enjoy concurrent service of his sentences. The order of the defendant's arrest and sentencing would play a more significant role than the dangerousness of the defendant or the seriousness of the offense. Arbitrary circumstances of this kind were not intended to play so substantial a role in determining the length of a sentence. *See United States v. Wilson*, 503 U.S. 329, 334 (1992) (rejecting an interpretation of § 3585(b) that would have made a district court's authority to award pre-sentence custody contingent on the order of state and federal sentencing, because it could "imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing.").

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imprisonment are imposed at different times, even if the judgment's silence was compelled by the first sentence of the statute.

D. The circuit court's rule raises serious concerns of federalism and comity.

The federalist system promotes a more open, responsive and accountable government, and safeguards against the concentration of power in a central government. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). Federalism depends, however, on the capacity of the states to vindicate their interests in their own courts, without federal interference. *See Younger v. Harris*, 401 U.S. 37, 44 (1971). Notably, Congress has recognized the importance of federal respect for state judgments by commanding federal courts to accord them full faith and credit. *See* 28 U.S.C. § 1738.

Federalism carries special importance in the enforcement of criminal sanctions. "Under our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); *see also Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998) ("It is difficult to imagine an activity over which the State has a stronger interest" than the administration of penal sanctions). More to the point, "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986).

When federal and state authorities impose overlapping criminal sanctions, the actions of each will necessarily affect the legitimate interests of the other.

Each sovereign has strong interests in defining the length of a defendant's punishment and in allocating its own penal resources. Discussing the conflicting interests at work in this situation, this Court stressed in *Ponzi* that:

> The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

Ponzi v. Fessenden, 258 U.S. at 259. Mutual deference is necessary both to avoid "embarrassing conflicts" and to maintain a federalist system in which citizens "live in the jurisdiction of two sovereignties." *Ponzi v. Fessenden,* 258 U.S. at 259.

Permitting federal courts to order consecutive sentencing with respect to future state sentences is not consistent with a system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. at 44.

And it is no good answer to say that anticipatory consecutive orders merely vindicate the federal court's interest in the full service of its own sentences. The relationship between federal and state sentences is necessarily a matter of joint federal and state

concern. Such orders denigrate the state court's interest in determining whether its own sentence shall add to the total term of punishment. They deprive the state court of the ability to decide how its own sentence shall be served, or what the consequence of its own judgment will be for the defendant. Importantly, a judgment compelling consecutive service can often be enforced only by dishonoring a state judgment.

The state court in this case imposed both state sentences concurrently with the previously imposed federal sentence. J.A. 29-30, 35-36; *see also Ex parte Spears*, 235 S.W.2d at 917-18 (Texas sentences run concurrently with previously imposed federal sentences unless state judge demands consecutive service). The federal government may well enjoy the constitutional authority to dishonor state judgments, but this is not the end of the inquiry. Federal restraint in this area will enable state institutions to exercise greater influence over the total sentence imposed. State institutions represent smaller constituencies, govern with nuanced appreciation for the local crime problems rather than by uniform national policy, and exercise the coercive power of criminal sanction over a limited geographic area. Certainly, open federal denigration of valid state judgments does not promote public respect for state institutions, or train citizens to look to state courts and executives for solutions to matters of public concern. Congress is presumed to speak clearly when it wishes to restrain state power in "traditionally

sensitive areas" affecting the federal balance. *United States v. Bass*, 404 U.S. 336, 349 (1971). It has not done so here.

E. Mr. Setser was not already subject to an undischarged term of imprisonment in his state probation case.

For the reasons discussed above, this Court should hold that a district court is without authority to order a federal sentence to run consecutively to a future state sentence. The consecutive sentencing authority is limited to existing sentences; those "undischarged terms of imprisonment" to which a defendant is "already subject." Mr. Setser's five-year term of probation, probating a five-year term of imprisonment is not such a sentence.

In its ordinary usage, "imprisonment" means physical confinement, not probationary freedom. *See* BLACK'S LAW DICTIONARY 757 (6th ed. 1990) (defining "imprisonment" as "[t]he act of confining a person, esp. in a prison."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 583 (10th ed. 1993) (primary definition of "imprison" is "to put in prison: confine in jail").

Probation, on the other hand, is a "[s]entence imposed for a commission of a crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer *in lieu of incarceration*." BLACK'S LAW DICTIONARY 1202 (6th ed. 1990) (emphasis added). Probation and imprisonment

are not fungible; they are sentences fundamentally different in character.

This Court has repeatedly noted the stark differences between a sentence of imprisonment and a sentence of probation. "Probation is 'one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.'" *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). "[I]ncarceration is an 'intrinsically different' form of punishment." *Blanton v. North Las Vegas*, 489 U.S. 538, 542 (1989) (quoting *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)) (further quotations omitted). A person on probation, much like a person on parole,

> although subject to some restraints on liberty, is not "imprisoned" in the sense in which the term is usually used. For example, if a parolee were informed at the end of a parole revocation hearing that the outcome was "imprisonment," the parolee would not think that meant he was going to be returned to parole.

United States v. Pray, 373 F.3d 358, 361 (3d Cir. 2004) (Alito, J.).

Federal courts interpreting the phrase "term of imprisonment" under USSG § 5G1.3, which implements 18 U.S.C. § 3584(a) and reproduces its language, have with near uniformity concluded that parole, probation, and supervised release do not qualify as

imprisonment. *See United States v. Pray*, 373 F.3d at 361 (parole); *United States v. Tisdale*, 248 F.3d 964, 976 (10th Cir. 2001) (probation); *United States v. Cofske*, 157 F.3d 1, 1-2 (1st Cir. 1998) (probation); *Prewitt v. United States*, 83 F.3d 812, 817-18 (7th Cir. 1996) (probation); *United States v. Bernard*, 48 F.3d 427, 431 (9th Cir. 1995) (supervised release). *See also United States v. Stewart*, 49 F.3d 121, 123 (4th Cir. 1995) (finding parole not "imprisonment" under USSG § 4A1.1). *But see United States v. French*, 46 F.3d 710, 716-17 (8th Cir. 1995) (relying on South Dakota law to conclude that parolee was legally "confined" and therefore subject to undischarged "term of imprisonment" under USSG § 5G1.3(b)).

Simply put, probation is a form of "conditional liberty," *Black v. Romano*, 471 U.S. 606, 611 (1985), while imprisonment is not liberty at all. Mr. Setser's sentence of probation was not an "undischarged term of imprisonment" and did not come within § 3584(a)'s grant of consecutive sentencing authority.

As discussed above, the statute permits a consecutive sentence only if the defendant is "already subject to" a term of imprisonment. A person is "already subject to" a term of imprisonment only if there is a judgment requiring that person to go to prison. To hold that Mr. Setser was "already subject to an undischarged term of imprisonment" merely because his probation might have been revoked would ignore Congress's choice to distinguish between defendants who were and were not sentenced. It would ignore

Congress's use of the phrase "term of imprisonment," rather than a broader phrase encompassing probationary sentences. It would ignore Congress's use of the word "already," which emphasizes finality. And it would ignore Congress's description of the necessary term of imprisonment as "undischarged," which plainly implies that the term of imprisonment has begun.

The legislative history likewise indicates that Congress focused on imprisonment, not probation. In discussing consecutive sentencing under § 3584(a), the legislative history refers to "a person already serving *a prison term*," a "*term of imprisonment* . . . imposed while the defendant *is serving another one*," and a person "who is already serving a term of *imprisonment* for a state offense." *See* S. REP. NO. 98-225 at 127-28 (emphases added).

At the time of federal sentencing, the state court had not yet acted on the motion to revoke. It had reached no conclusion as to whether it would revoke, modify, or continue Mr. Setser's probation. The state court had not imposed any term of imprisonment. Consequently, Mr. Setser was not "*already subject to* an *undischarged* term of *imprisonment*" at the time of his federal sentencing.

II. Alternatively, inclusion of the consecutive order resulted in an unreasonable sentence.

This Court need not reach the second question if it holds the consecutive sentencing order is unlawful.

Even if a court may impose its sentence consecutive to a future state sentence, Mr. Setser's sentence is unreasonable because it contradicts itself and cannot be fully implemented. Appellate courts review sentences for reasonableness. *See United States v. Booker*, 543 U.S. 220, 261 (2005). The circuit courts have concluded that *Booker* reasonableness review applies to the decision to run a sentence consecutive. *See, e.g.*, *United States v. Padilla*, 618 F.3d 643, 647 (7th Cir. 2010) ("Because the court conducted an intelligent and exhaustive analysis of the § 3553(a) factors, its decision to impose a consecutive sentence was reasonable.").[4]

The Sentencing Commission agrees that a court's decision to impose a federal sentence consecutive, concurrent, or partially concurrent to an undischarged sentence must be made with an eye to "achiev[ing] a

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[4] *See also United States v. Harmon*, 607 F.3d 233, 236 (6th Cir. 2010) (applying a reasonableness standard of review to a challenge to a consecutive sentence); *United States v. Carrasco-De-Jesus*, 589 F.3d 22, 26-30 (1st Cir. 2009) (reviewing consecutive order for procedural and substantive unreasonableness); *United States v. Hahn*, 551 F.3d 977, 981 (10th Cir. 2008) ("We review the district court's [consecutive sentencing] decision for abuse of discretion."); *United States v. McDonald*, 521 F.3d 975, 980 (8th Cir. 2008) ("We review a district court's decision to impose a consecutive or concurrent sentence for reasonableness." (quoting *United States v. Winston*, 456 F.3d 861, 867 (8th Cir. 2006))); *United States v. Matera*, 489 F.3d 115, 123-24 (2d Cir. 2007) (reviewing consecutive sentences for "reasonableness"); *United States v. Candia*, 454 F.3d 468, 471 (5th Cir. 2006) ("[U]nder *Booker*, the consecutive nature of a properly calculated guidelines sentence is reviewed for unreasonableness.").

reasonable punishment for the instant offense." USSG § 5G1.3(c), p.s.; *see also* § 5K2.23 (permitting a downward departure where defendant has been released from a prior sentence which would otherwise warrant concurrent sentencing under § 5G1.3 so long as it is "fashioned to achieve a reasonable punishment for the instant offense").

Whatever else "reasonable" means, it surely does not encompass absurd results. "[A] sentencing court's ultimate responsibility is to articulate a plausible rationale and arrive at a sensible result." *United States v. Carrasco-De-Jesus*, 589 F.3d 22, 30 (1st Cir. 2009). Because the judgment is self-contradictory, the result here is neither "sensible" nor "reasonable."

A. The district court's judgment is impossible to implement.

The district court ordered Mr. Setser's sentence to run consecutively to any term of imprisonment in the 2006 state probation revocation case but concurrently with any term of imprisonment in the 2007 state drug case. J.A. 15-16. However, the state cases produced only one term of imprisonment because the state court ordered them to run concurrently with each other. J.A. 30, 36. A federal sentence cannot run both concurrently with and consecutively to the same state term of imprisonment.

BOP could have implemented either the concurrent or consecutive sentencing order, but it could not implement both. BOP could have implemented the

concurrent sentencing order by designating the state institution for service of the federal sentence. *See* BOP Program Statement No. P5160.05 § 9; *see also* Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under Primary Jurisdiction* 3-4 (July 7, 2011), http://www.bop.gov/news/ifss.pdf (last visited August 16, 2011).[5] Alternatively, it could have implemented the consecutive sentencing order by refusing to designate the state institution as the location for the service of the federal sentence, so that the defendant's federal sentence would not start until he was released from state custody. *See* BOP Program Statement No. P5160.05 § 9; Sadowski, *supra*, at 4.

Here, the federal judgment gives inconsistent instructions. Until his release from state custody, Mr. Setser was serving "state time" for both his trafficking offense and his probation revocation. Thus, the federal judgment orders BOP to count and not count the same period of time toward the federal sentence. In other words, the judgment effectively ordered BOP to start the sentence on the date of federal sentencing and to wait until the conclusion of the defendant's state imprisonment to start the sentence. To follow the consecutive order is to violate the concurrent order and vice versa. The federal judgment is not

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[5] Even if that designation is not made at the time of federal sentencing, BOP can retroactively identify the state institution as the place for service of the federal sentence. *See* BOP Program Statement No. P5160.05 § 9; Sadowski, *supra*, at 4.

merely "ambiguous," (Brief in Opp. at 13), it is at war with itself.

B. An impossible sentence is an unreasonable sentence.

"Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *United States v. Daugherty*, 269 U.S. 360, 363 (1926). This Court has long held, moreover, that a defendant should not be sentenced on the basis of "materially untrue" assumptions. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Here, it is impossible to follow the sentencing court's intent. Its consecutive order can be followed only to the extent that its concurrent order is violated. Describing this judgment as "reasonable" does violence to the concept of reason. The circuit court could not bring itself to call the outcome "reasonable." Instead, it recognized that the sentence was "irreconcilab[le] with the state sentence" and at least "partially foiled." J.A. 62. Yet, the court upheld the sentence. J.A. 64.

But a judgment with "irreconcilable" or "foiled" terms cannot be "reasonable." A sentence that cannot be implemented cannot sensibly be said to achieve the goals enumerated at § 3553(a)(2). If nothing else, such a self-contradicting judgment fails Congress's mandate that sentences "promote respect for the law" and "provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).

Here, the government recognizes that Mr. Setser's federal judgment "presumes that the federal sentence can be run consecutively to one state sentence but not the other." (Brief in Opp. at 13.) But, as demonstrated above, that assumption was false.

The Fifth Circuit acknowledged that a federal sentence must not be "ambiguous with respect to the time and manner in which it is to be served" or "internally self-contradictory." J.A. 61 (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)). That principle should have settled the matter in Mr. Setser's favor. However, the circuit court declined to correct the error because:

> [T]here is nothing *plainly* self-contradictory or uncertain about the sentence in and of itself. . . . Any ambiguity in the district court's sentence was not introduced until after the state court ordered Setser's two state sentences to run concurrently.

J.A. 61 (emphasis added). Apparently, the circuit court thought it unfair or otherwise inappropriate to reverse the district court based upon events which had not yet come to pass at the time the district court acted.

At least two fatal flaws undercut this reasoning. First, the district court itself created the possibility that the sentence would become "internally self-contradictory" when it sought to manipulate sentences that did not exist.

Second, when appellate courts become aware of facts that bear on the reasonableness of a sentence, they should not ignore them. The judgment directs action with respect to "the sentence imposed" in the 2006 state probation case and to "the sentence imposed" in the 2007 state drug case, but both of those phrases refer to a single term of imprisonment. Once that fact is known, the federal sentence is "plainly self-contradictory." J.A. 61. The Fifth Circuit knew and acknowledged that the state sentences would be served as a single term of imprisonment, but it chose to ignore that fact when reviewing the federal sentence.

III. The proper remedy is to strike the consecutive term of the judgment.

The relief in this case should eliminate the district court's consecutive sentencing order and preserve the concurrent sentencing order. The party presentation principle compels relief because the government declined to challenge the concurrent order at every stage. It did not object to the order in the district court and, in fact, affirmatively argued that the court had the authority to issue anticipatory sentences. It declined to cross-appeal, and did not challenge the concurrent order before the court of appeals.

"Our adversary system is designed around the premise that the parties know what is best for them and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United*

States, 554 U.S. 237, 244 (2008) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring)) (alteration omitted). Because the government never challenged the concurrent order, "an appellate court may not alter [the] judgment to benefit" the government. *See Greenlaw v. United States*, 554 U.S. at 244. Nor should Mr. Setser suffer the loss of that favorable order. A reviewing court should not enlarge the relief given a non-appealing party even if an error is plain or arguably results in a sentence imposed "in violation of law." *Greenlaw v. United States*, 554 U.S. at 247-53.

If the case returns to the district court for a full resentencing, Mr. Setser will irretrievably lose the concurrent order, because both state sentences have been discharged. At resentencing, he would come before the district court with no "undischarged term of imprisonment," and the court would not have authority under § 3584(a) to impose a concurrent sentence. *See United States v. Cruz*, 595 F.3d 744, 745 (7th Cir. 2010) ("[A]lthough he was paroled rather than released unconditionally, his state sentence was 'discharged' for purposes of deciding whether the federal judge could impose a concurrent sentence.").

On the other hand, if this Court strikes the consecutive order, but leaves intact the concurrent order, Mr. Setser could receive the benefit of the concurrent order. This could be accomplished through retroactive designation of his state facility as the "place of imprisonment" for service of his federal sentence, effectively granting him concurrent service of his federal

sentence and his 2007 state drug sentence. *See* BOP Program Statement No. P5160.05 § 9.

CONCLUSION

For the foregoing reasons, Mr. Setser requests that this Court strike the consecutive sentencing term from the district court's judgment, or remand the case to the court of appeals with instructions to strike it. Alternatively, he requests that this Court reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 10-7387

In the Supreme Court of the United States

MONROE ACE SETSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES SUPPORTING PETITIONER

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QUESTION PRESENTED

At a federal sentencing proceeding, the district court may order that terms of imprisonment run consecutively or concurrently "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." 18 U.S.C. 3584(a). The question presented is as follows:

Whether a federal district court has authority to order that a federal sentence run consecutively to an anticipated state sentence that the state court has not yet imposed.

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In the Supreme Court of the United States

No. 10-7387

MONROE ACE SETSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES SUPPORTING PETITIONER

OPINION BELOW

The opinion of the court of appeals (J.A. 54-64) is reported at 607 F.3d 128.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. A petition for rehearing was denied on August 5, 2010 (J.A. 65-66). The petition for a writ of certiorari was filed on November 2, 2010, and granted on June 13, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2. He was sentenced to 151 months of imprisonment, to be followed by five years of supervised release. J.A. 14-16. The court of appeals affirmed. J.A. 54-64.

1. On October 1, 2007, local police officers observed petitioner driving with a defective headlight and stopped his car. When petitioner unexpectedly exited the car, the officers searched him. They discovered 11 grams of marijuana and $1740 in United States currency on his person. A further search of petitioner's vehicle uncovered hydrocodone, methamphetamine, pure cocaine base, a semiautomatic handgun, and assorted handgun ammunition. Petitioner was then taken into state custody on Texas state narcotics charges. J.A. 71-72.

At the time of his arrest, petitioner was on probation for a felony offense. In March 2007, petitioner had been convicted in Texas state court of possession of four to 200 grams of methamphetamine with intent to deliver. He had been sentenced to five years of community supervision (probation). J.A. 72, 78. The State applied to revoke his probation based on a number of violations, including the October 2007 drug and firearms violations. The State also obtained an indictment charging petitioner with possession of methamphetamine with intent to deliver. J.A. 78.

2. On March 28, 2008, while petitioner was in state custody and the state charges were still pending, a federal grand jury in the Northern District of Texas re-

turned an indictment charging petitioner with possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2; possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) and 2; and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 2. J.A. 11-13.

The district court issued a federal writ of habeas corpus ad prosequendum, and petitioner was transferred to federal authorities for prosecution. J.A. 70. Pursuant to a plea agreement, petitioner pleaded guilty to the methamphetamine-possession count. The other federal charges were dismissed on the government's motion. J.A. 14, 70.

The Presentence Report (PSR) recommended an advisory Sentencing Guidelines range of 121 to 151 months of imprisonment for the drug conviction. The PSR also reported that petitioner faced pending Texas state charges both for the narcotics offense and for violation of probation. J.A. 87. The PSR noted that under Fifth Circuit precedent, the district court could impose a sentence consecutively to any sentence that might be imposed on the state charges. *Ibid.* (citing *United States* v. *Brown*, 920 F.2d 1212 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991)).

In *Brown*, the Fifth Circuit considered 18 U.S.C. 3584(a), which allows a federal district court to order that terms of imprisonment run concurrently or consecutively if the court is itself imposing "multiple terms of imprisonment * * * at the same time," or if the defendant "is already subject to an undischarged term of imprisonment." The Fifth Circuit concluded that the stat-

ute provided discretion broad enough to cover situations in which the defendant faced separate state proceedings, even if he had not yet been convicted or sentenced at the time of his federal sentencing. The court therefore sustained an order directing that Brown's federal sentence run consecutively to the "anticipated" state sentence he would likely receive if convicted. *Brown*, 920 F.2d at 1217.

Petitioner preserved an objection to the statement in the PSR that the district court had the power to impose a sentence consecutive to a state sentence. J.A. 93.

The district court sentenced petitioner to 151 months of imprisonment, to be followed by five years of supervised release. J.A. 15-16. The court ordered that the sentence would run concurrently with "any sentence imposed" by Texas on the pending narcotics charges, which arose from the same October 2007 conduct as petitioner's federal conviction, but consecutively to "any sentence imposed" in the pending proceedings to revoke petitioner's probation. J.A. 16.

3. Following federal sentencing, petitioner was returned to state authorities, and his federal sentence did not begin running. In December 2008, he was convicted in state court on the narcotics charge and his probation on the earlier narcotics charge was revoked. The state court sentenced him to ten years of imprisonment on the narcotics charge and five years on revocation of probation, to be served concurrently with one another. J.A. 29-40.

In March 2010, after approximately two and a half years in state custody, petitioner was paroled. J.A. 45, 53. He was then transferred to federal custody and be-

gan serving his federal sentence, with no credit for the time spent in state custody. See J.A. 42-43.

4. The court of appeals affirmed. J.A. 54-64.

Petitioner conceded that under binding circuit precedent, the district court had authority to order petitioner's sentence to run consecutively to an anticipated state sentence. The court of appeals acknowledged an extensive circuit conflict on the question whether Section 3584(a) can be read to confer such authority, but the court adhered to its precedent. J.A. 58-60 (citing *Brown*, 920 F.2d at 1216).[1]

Petitioner also contended that the consecutive-sentencing order had been rendered unreasonable by the state court's imposition of sentence. The district court had ordered that the federal sentence run consecutively to one state sentence, but concurrently to the other; the state court, however, imposed the two state sentences concurrently to one another, and petitioner served them both simultaneously. The court of appeals rejected petitioner's contention, because the federal court had acted reasonably at the time of sentencing. J.A. 61. To the extent that petitioner contended that subsequent events warranted giving him credit against his federal sentence for time he spent in state custody, the court of appeals stated, petitioner should first address that contention to the Federal Bureau of Prisons

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[1] In December 2008, the Solicitor General determined that the United States would take the position now advanced in this brief, *i.e.*, that Section 3584(a) does not permit such consecutive-sentencing orders. All federal prosecutors were informed of the government's position and directed to adhere to it, except where foreclosed by circuit precedent. Accordingly, the government agreed in the court of appeals that the issue was controlled by *Brown*. Gov't C.A. Br. 15.

(BOP) and exhaust his administrative remedies. J.A. 62-63.

SUMMARY OF ARGUMENT

I. Section 3584(a) does not give district courts the authority to order that a federal term of imprisonment run consecutively to a hypothetical future state term. Section 3584(a) is a limited grant of authority that applies in only two situations. First, when the federal court itself imposes multiple terms of imprisonment "at the same time," the court may specify whether those sentences run concurrently or consecutively. Second, when the federal court sentences a defendant who is "already subject to an undischarged term of imprisonment," the court may specify whether the federal sentence shall run concurrently with or consecutively to the earlier sentence. Petitioner fits into neither category, because he received only a single federal term and was not subject to any "undischarged" state term at the time of his federal sentencing.

Section 3584(a) also provides two default rules, one for each of the two situations in which Section 3584(a) gives district courts authority. If the court does not expressly exercise that authority, then the presumption is that "[m]ultiple terms of imprisonment imposed at the same time run concurrently" and "[m]ultiple terms of imprisonment imposed at different times run consecutively."

Some courts have misread the latter default rule as a grant of power to the district court to order consecutive service whenever "[m]ultiple terms of imprisonment [are] imposed at different times," even when one of those "terms of imprisonment" has not yet been imposed but may be at some future time. But that interpretation

would read Section 3584(a)'s limitations out of the statute. If district courts could order consecutive or concurrent service whenever "multiple terms of imprisonment" are imposed or anticipated, Congress would have had no reason to specify that the district court's authority extends to defendants with "undischarged" sentences.

A consecutive-sentencing order that looks into the future is also at odds with the statutory structure. When deciding whether to impose concurrent or consecutive terms under Section 3584, federal courts must consider a set of prescribed factors, such as the need to provide "just punishment," "deterrence," and protection for the public. 18 U.S.C. 3553(a), 3584(b). Those factors can sensibly be applied when the district court is considering whether to make *existing* terms concurrent or consecutive, but they are hard to apply to a term that is only anticipated. And imposing a binding order that any future term run consecutively, no matter when it is imposed or how long it is, would conflict with the sentencing authority of the court that actually imposes that future term of imprisonment—authority that, in federal court, comes from Section 3584(a) itself. Reading the statute to apply only to existing terms of imprisonment, not future ones, avoids these significant problems inherent in the reading adopted by the court of appeals.

The legislative history confirms that Congress intended for Section 3584(a) to apply in only two situations: when two terms of imprisonment "are imposed at the same time," and when "one term of imprisonment is imposed while the defendant is serving another one." S. Rep. No. 225, 98th Cong., 1st Sess. 126 (1983) (Senate Report). The Sentencing Commission, which implements Section 3584(a) through policy statements, reads

the statute the same way. That reading does not infringe on courts' inherent authority in any way.

II. Under the legal framework that governs the imposition and service of terms of imprisonment, when a court imposes a first term of imprisonment but anticipates that the defendant may later receive a second in another court, the first sentencing court does not have the responsibility or the authority to specify concurrent or consecutive service. Rather, once the first sentence is imposed, that sentence will inform the second sentencing court's judgment about how much additional incremental punishment is warranted.

A second means of making the consecutive-versus-concurrent determination remains with the custodian: one sovereign may, if it chooses, count against its sentence the time that a defendant spends in another sovereign's custody. In the federal system, deciding where a defendant serves his sentence is an executive function that the BOP performs on behalf of the Attorney General. The BOP has established procedures that allow a defendant to request that he be permitted to serve his federal sentence in state custody. The BOP makes those determinations with the benefit of the first federal sentencing judge's view, to which it gives great deference, but also with the benefit of additional information that may develop after the first federal sentencing, such as the details of the second offense, conviction, and sentence and the inmate's disciplinary history. Because the BOP retains the ability to exercise discretion in this area and to decide whether concurrent or consecutive service is warranted once the second sentence is imposed, there is no reason to distort the text of Section

3584(a) to allow that decision to be made prematurely, at the time of the first federal sentencing.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY ORDERING THAT PETITIONER'S TERM OF IMPRISONMENT RUN CONSECUTIVELY TO AN ANTICIPATED FUTURE STATE TERM

Section 3584(a) gives district courts the authority to order that terms of imprisonment run consecutively or concurrently, but that authority is limited to two circumstances: if the court is itself imposing "multiple terms of imprisonment * * * at the same time," or if the defendant "is already subject to an undischarged term of imprisonment." Because a state term of imprisonment cannot be imposed "at the same time" as a federal term, a district court may direct that a federal term run consecutively to a state term only if the state term is "undischarged" at the time of sentencing. When petitioner was sentenced in federal court, he was not "already subject" to any "undischarged" term of imprisonment, because Texas had not yet imposed one. Thus, Section 3584(a) confers no authority to enter a consecutive-sentencing order like the one the district court imposed here.

A. Section 3584(a) Applies To Cases Involving Simultaneous Or "Undischarged" Terms Of Imprisonment, Not Anticipated Future Terms

Section 3584(a) contains three sentences. The first grants authority to district courts to prescribe consecutive or concurrent service in two situations; the second and third specify what happens, in those two situations,

when district courts remain silent. No other reading can be reconciled with the text, structure, and context of Section 3584(a).

1. Under Section 3584(a), authority to order consecutive or concurrent service is limited to two specific situations

The first sentence of Section 3584(a) provides:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt.

This sentence identifies the two situations in which a district court may specify how terms of imprisonment are to run: (1) when "multiple terms of imprisonment are imposed on a defendant at the same time," and (2) when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." The sentence also identifies the only exception to that grant of authority: even in those two situations, the district court may *not* order consecutive terms for an attempt and the sole object of the attempt.

In the two situations that Section 3584(a) addresses—simultaneously imposed terms and undischarged terms—the district court may expressly specify that terms of imprisonment shall run concurrently, consecutively, or partly consecutively. If the district court does *not* so specify, the statute prescribes default rules in the second and third sentences of Section 3584(a). Each of

those two sentences sets the default rule for one of the two situations that Section 3584(a) addresses.

The second and third sentences provide: "Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." Both sentences refer to the authority of the district court under the first sentence; both sentences specify what is to happen "unless" the court exercises that authority (or another statute requires consecutive service, see, *e.g.*, 18 U.S.C. 924(c)). Those two sentences correspond to the two situations set out in the first sentence.

The logic of the statute makes that relationship clear. The first sentence encompasses simultaneously imposed terms and undischarged terms. The second sentence sets a presumption for defendants with simultaneously imposed terms, *i.e.*, "[m]ultiple terms of imprisonment imposed at the same time." The third sentence sets the presumption for defendants with an undischarged term at the time they receive their federal term, *i.e.*, "[m]ultiple terms of imprisonment imposed at different times."

Thus, a district court imposing a term of imprisonment may order that the term run consecutively to another term that is being imposed "at the same time," or to another, "undischarged" term that has "already" been imposed. But nothing in Section 3584(a) allows the court to anticipate a term of imprisonment that *may* be imposed in the future. A defendant is not "already subject to an undischarged term of imprisonment" unless that

term has been imposed but not completed. See *Black's Law Dictionary* 417 (5th ed. 1979) (in criminal law, "discharge" means "[t]he act by which a person in confinement * * * is set at liberty"); *Webster's Third New International Dictionary* 644 (1976) ("discharge" means "to set at liberty[,] release from confinement, custody, or care <[discharge] a prisoner>"). A term that does not yet exist cannot be discharged, nor can it be called undischarged (any more than it could be called "incomplete" or "unfinished" before it begins). Petitioner was not "already subject to an undischarged term" when his single federal term of imprisonment was imposed, and Section 3584(a) therefore did not apply.[2]

2. Section 3584(a)'s limitations cannot be read out of the statute

Some courts have read the third sentence of Section 3584(a) as allowing district courts to regulate (or as regulating of its own force) even terms of imprisonment that are outside the scope of the first sentence. See, *e.g.*, *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995); *United States* v.

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[2] Although petitioner was in state *pretrial* custody when he was produced to the federal district court for arraignment, plea, and sentencing, pretrial custody is not a "*term* of imprisonment" as used in Section 3584(a). Cf. 18 U.S.C. 3581(a) ("A defendant who has been found guilty of a crime may be sentenced to a term of imprisonment."); 18 U.S.C. 3585(b) (time spent in pretrial or presentence "official detention" may be *credited* against "a term of imprisonment"); *Reno* v. *Koray*, 515 U.S. 50, 59 (1995). Even if some of petitioner's pretrial custody was *later* credited against his state term of imprisonment, at the time of his federal sentencing petitioner was not "already subject to an undischarged term of imprisonment." Petitioner's only undischarged sentence was not a term of imprisonment, but probation, which had not yet been revoked.

Ballard, 6 F.3d 1502, 1505, 1506 (11th Cir. 1993). That reading is mistaken, because it would confer authority that swallows up the more limited grant set out in the first sentence and renders the limitations surplusage.

To begin with, reading the third sentence as an independent grant of authority would read the limitations in the first sentence out of Section 3584(a). Congress began the subsection by specifying which terms of imprisonment may be ordered to run concurrently or consecutively: two or more terms that are imposed at the same sentencing, and two or more terms of which some are "undischarged" when the rest are imposed. When Congress chooses to enact a limited grant of authority, the words of limitation should be construed to have real meaning; "[i]t would be illogical to assume that Congress * * * would turn around and nullify its own choice" with the next words in the same subsection. *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 343 (1994); see *id.* at 340 (rejecting a construction under which one subdivision prohibits what the adjacent one allows); see generally, *e.g.*, *Board of Trs. of the Leland Stanford Jr. Univ.* v. *Roche Molecular Sys.*, 131 S. Ct. 2188, 2196 (2011) (declining to read a statutory phrase as "add[ing] nothing that is not already in the [statute]"). Yet the reading espoused by the Tenth and Eleventh Circuits would deprive the limitations in the first sentence of any effect. Considered in isolation and without reference to the first sentence, the second and third sentences of Section 3584(a) together would cover *all* cases in which a defendant receives "[m]ultiple terms of imprisonment." That would include all cases that fall within the first sentence, but also cases like petitioner's that the first sentence excludes because the state term

was not "undischarged" at the time the federal term was imposed. For the limiting conditions in the first sentence to have any meaning, therefore, the first sentence must set the scope for Section 3584(a) as a whole: cases involving simultaneous or undischarged terms. In cases within that scope, the second and third sentences set the default rule; in cases outside that scope, the second and third sentences simply have no role to play.[3]

In addition, the first sentence contains not only a scope limitation (applying only to cases with simultaneous or "undischarged" terms), but also a substantive limitation (requiring the court to impose concurrent terms of imprisonment for attempt and the object of the attempt). Treating the second or third sentences as independent grants of authority threatens to negate that substantive limitation as well. If the third sentence authorized the district court to order petitioner's federal term of imprisonment (for possession of methamphetamine) to run consecutively to an anticipated future state term (also for possession of methamphetamine), then the third sentence presumably could also authorize

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[3] The Seventh Circuit has incorrectly suggested that the canon against creating surplusage cuts in the opposite direction—that the *third* sentence would be reduced to "surplusage" if it operated only in "those situations also covered by the first sentence (that is, to defendants serving undischarged terms, or other terms imposed on the same occasion)." *Romandine* v. *United States*, 206 F.3d 731, 738 (2000). As explained in the text, the third sentence still does independent work even when (properly) applied only within the scope set out by the first sentence: in such cases, if the district court fails to expressly invoke the authority given it by the first sentence, the third sentence makes the sentences run consecutively. And in any event, the Seventh Circuit did not read the third sentence as an affirmative grant of authority for district courts—only as a presumption that applies no matter what the court says. *Id.* at 737, 738.

the court to order consecutive terms for possession and *attempted* possession. Congress placed considerable importance on the principle that attempt crimes and their objects should not produce consecutive terms of imprisonment. Congress identified other circumstances in which it directed the Sentencing Commission to prescribe guidelines limiting consecutive terms.[4] But attempt crimes were the only crimes for which Congress specifically forbade courts to impose consecutive terms. Congress surely did not intend to nullify that important limitation in the next two sentences. And if the first sentence's substantive limitation applies, so does its scope limitation.

Indeed, the placement of the two limitations on authority to order consecutive sentences—limitations both as to substance and scope—in the first sentence is further confirmation that the authority itself also comes from that sentence. If the authority to impose a consecutive term came from the third sentence (or the second), it would be highly unusual for the limitations on that authority to come beforehand and appended to a different sentence.

3. The sentencing factors Congress prescribed cannot readily be applied to anticipated future sentences

Congress directed federal judges, in considering whether to impose consecutive or concurrent terms of imprisonment, to consider "the factors set out in [18 U.S.C.] 3553(a)," the same factors considered in deter-

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[4] See 28 U.S.C. 994(*l*)(2) (conspiracy or solicitation and the sole object of the conspiracy or solicitation); 28 U.S.C. 994(v) ("violation of a general prohibition" and "violation of a specific prohibition encompassed within the general prohibition").

mining the nature and length of a sentence, "as to each offense for which a term of imprisonment is being imposed." 18 U.S.C. 3584(b). Applied in the context of concurrent and consecutive terms of imprisonment, the Section 3553(a) factors logically govern the relationship between two actual, definite terms of imprisonment, not between an actual term and a hypothetical one.

Section 3553(a)(2) requires a federal sentencing court to fashion a sentence that will, *inter alia*, "provide just punishment," "afford adequate deterrence," and "protect the public from future crimes of the defendant." 18 U.S.C. 3553(a)(2)(A)-(C). And Section 3553(a)(6) requires the sentencing court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). In general, deciding whether a federal sentence should run consecutively to another sentence will often require knowing the total time the defendant will spend in prison, which depends on what the other sentence will be—and, indeed, whether the defendant will be incarcerated on the other sentence at all, or will instead obtain an acquittal, fine, probation, or suspended sentence.

Thus, to apply the Section 3553(a) factors to the question of consecutive versus concurrent service, the court may need to know whether the defendant will begin serving his consecutive federal sentence five years from now or 45 years from now. And even if some aspects of the answer can be predicted, others may change. Cf., *e.g.*, *Pepper* v. *United States*, 131 S. Ct. 1229, 1242-1243 (2011) (changes in defendant's conduct and characteristics between original sentencing and resentencing were relevant to Section 3553(a) factors); *United States* v.

Wilson, 503 U.S. 329, 334 (1992) (district court lacked authority to make sentencing-credit determination under 18 U.S.C. 3585, because "[a]t [the time of] sentencing, the [court] only could have speculated about" the facts necessary).

In this case, the district court directed that petitioner's federal sentence run consecutively to any state sentence that might be imposed for petitioner's possession of methamphetamine in 2006. Petitioner's state offense was a first-degree felony, for which the minimum sentence is five years and the maximum is life imprisonment. Tex. Health & Safety Code §§ 481.102(6), 481.112(d) (Vernon 2010); Tex. Penal Code § 12.32(a) (Vernon 2011). In considering the Section 3553(a) factors and deciding whether the federal and state sentences should run consecutively, the district court may have speculated about whether the state court would in fact order petitioner incarcerated and, if so, for how long.[5] Removing future sentences from the sentencing calculus avoids the need to speculate about future contingencies, in which the range of possible outcomes can be extremely broad. In this case, petitioner's state proceedings could have produced anything from acquittal to life imprisonment.

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[5] Petitioner committed his federal offense while on probation for a state offense; under those circumstances, a consecutive sentence might be warranted under the Section 3553(a) factors irrespective of the length of the consecutive sentence. The Sentencing Commission's policy statement, which is a relevant consideration for both the sentencing court, see 18 U.S.C. 3553(a)(5), and the BOP, see 18 U.S.C. 3621(b)(5), recommends that a new sentence run consecutively to a sentence imposed for revocation of parole or probation, to ensure that each offense carries some incremental punishment. Sentencing Guidelines § 5G1.3 comment. (n.3(C)).

4. Construing Section 3584(a) to reach future sentences would disrupt the statutory scheme

Reading Section 3584(a) to reach future sentences is also untenable because it would effectively deprive federal judges in future cases of their authority under Section 3584(a) itself. Statutes should be construed to create "a symmetrical and coherent regulatory scheme." *E.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). But reading Section 3584(a) to cover future sentences would introduce a significant asymmetry. If the first federal judge to sentence a defendant could order that existing *and future* terms of imprisonment all run consecutively, that order would effectively remove the comparable authority of the second federal judge, *i.e.*, the judge who will impose that future term.

When a defendant who is serving one federal sentence commits another federal crime, the federal judge in the second case has the express authority to run the second term of imprisoment consecutively, because the defendant "is already subject to an undischarged term of imprisonment." 18 U.S.C. 3584(a). Allowing the district judge in the first case to instead make that decision in advance lacks any basis in Section 3584(a); usurps the second judge's authority; and leaves the second judge "with the Hobson's choice of either ignoring his own judgment [that a concurrent or consecutive sentence was appropriate] or disobeying the order of another district court." *United States* v. *Smith*, 472 F.3d 222, 226-227 (4th Cir. 2006).

For that reason, every circuit to consider the question has concluded that a federal court may not order that a term of imprisonment run consecutively to an antici-

pated future *federal* sentence. See *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497-498 (5th Cir. 2008); *Smith*, 472 F.3d at 226-227 & n.*; see also *ibid.* (citing cases involving state sentences). Indeed, while the court below has adhered for 20 years to its view that Section 3584(a) confers such a power with respect to a future *state* sentence, see J.A. 57-60, it reached the opposite conclusion with respect to a future *federal* sentence. *Quintana-Gomez*, 521 F.3d at 497-498.[6] The court noted that "as a general principle, one district court has no authority to instruct another district court how, for a different offense in a different case, it must confect its sentence." *Id.* at 498. Yet that is the result of reading Section 3584(a) to allow federal judges to prescribe concurrent or consecutive treatment for anticipated terms.

The court below has sought to avoid that problem by applying different rules for future federal sentences (anticipatory consecutive sentencing precluded) and future state sentences (anticipatory consecutive sentencing permitted). But that distinction has no basis in the text of Section 3584(a), which refers generally to "terms of imprisonment" without specifying which court imposes them. See *Quintana-Gomez*, 521 F.3d at 497-498. The Fifth Circuit asserted that "principles of dual sovereignty" supported giving federal courts authority to direct a consecutive sentence with respect to a future state sentence. *Id.* at 497. But respect for the State's role counsels *against*, not for, construing Section 3584(a) to give federal courts authority to direct how future state sentences shall be treated. This Court has recognized

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[6] Although three other circuits agree with the court below about future state sentences, those circuits do not appear to have addressed future federal sentences.

that "administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain." *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009). To the extent that the first court's consecutive-sentencing order actually binds the second court,[7] therefore, that binding order would be especially problematic if it is a state court that is bound.[8] Section 3584(a) should be read to avoid those significant pitfalls. See *Brown & Williamson*, 529 U.S. at 133; cf. *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 140-141 (2004) ("working assumption" that Congress usually does not "trench on the States' arrangements for conducting their own governments").

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[7] Recognizing the potential friction that otherwise could result, several courts have suggested that when a federal court orders that the federal sentence run consecutively to a future state sentence, the federal court's order does not actually bind the state judicial or executive branches or preclude them from reducing the state sentence because of the federal time the defendant will serve. See, *e.g.*, *Quintana-Gomez*, 521 F.3d at 497 (circuit precedent "did not hold that the state court was so legally bound by the federal court's order that the state court could not order its sentence to run concurrently with the federal sentence if it chose to do so"); *United States* v. *Andrews*, 330 F.3d 1305, 1307 n.1 (11th Cir.) (per curiam) ("The fact that the federal district court elected to sentence Andrews to a consecutive federal sentence by no means limits the sentencing options available to the state court."), cert. denied, 540 U.S. 1003 (2003).

[8] Cf. *United States* v. *Gonzales*, 520 U.S. 1, 11 (1997) (reserving the analogous question whether 18 U.S.C. 924(c)'s consecutive-sentencing requirement binds state courts that impose sentence after a federal court imposes a sentence under Section 924(c)).

B. The Legislative History Confirms That Section 3584(a) Does Not Apply To Anticipated Future State Sentences

Section 3584 was adopted as part of the Sentencing Reform Act of 1984.[9] That statute was itself one chapter of a larger criminal-justice bill, the Comprehensive Crime Control Act of 1984,[10] that received extensive consideration in both Houses of Congress over many sessions before its enactment. See, *e.g.*, *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 399-400 & n.2 (1991); Senate Report 1-2. Section 3584(a) passed the Senate just as it reads today, see 130 Cong. Rec. 1595 (1984), and the Senate Judiciary Committee's extensive report on the omnibus measure explains the provision as enacted. Senate Report 125-128.[11]

The Senate Report carefully sets out the scope of Section 3584(a), but never mentions anticipated or future sentences. To the contrary: the report first summarizes "current law" as it then applied to "[t]erms of imprisonment imposed at the same time" and to "[a] term of imprisonment imposed on a person already serving a prison term." Senate Report 126. The report then explains that the new legislation would cover the same ground: "[p]roposed 18 U.S.C. 3584(a) provides that sentences to multiple terms of imprisonment may, with one exception, be imposed to be served either concurrently or consecutively, whether they are imposed at the

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[9] Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987.

[10] Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.

[11] The House adopted the Senate version of the Comprehensive Crime Control Act verbatim (in adding it to another piece of omnibus legislation), see 130 Cong. Rec. at 26,834, 26,836, 26,838, and although some changes were made to other provisions of the Sentencing Reform Act in conference, Section 3584(a) was not amended.

same time or one term of imprisonment is *imposed while the defendant is serving another one.*" *Ibid.* (emphasis added).

As the Senate Report explains (at 126), Section 3584(a) has its origins in a report of the National Commission on Reform of Federal Criminal Laws (National Commission), a body chartered by Congress,[12] numbering several federal judges and Members of Congress among its members, and aided by an advisory committee chaired by retired Justice Clark. *Final Report of the National Commission on Reform of Federal Criminal Laws* at v-vi, xi (1971) (*National Commission Report*). The operative text of the National Commission's proposal is nearly identical to the first sentence of Section 3584(a) as subsequently enacted.[13] And the National Commission made clear that it did not intend its proposal to extend to future state sentences: the sentencing authority it proposed—which included several substantive limitations—"shall apply not only when a defendant is sentenced at one time for multiple offenses but also when a defendant is sentenced at different times for multiple offenses *all of which were committed prior to the imposition of any sentence for any of them.*" *Id.* at 292 (proposed § 3204(6)) (emphasis added).

Furthermore, the explanations of the Senate committee and the National Commission confirm that the sec-

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[12] See Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516.

[13] The National Commission's proposal read: "When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently or consecutively as determined by the court." *National Commission Report* 291 (proposed § 3204(1)).

ond and third sentences of Section 3584(a) provide default rules, not new grants of authority that override the limitations set out in the first sentence. The Senate committee stated that "Subsection (a) is intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject." Senate Report 127. And the committee reiterated that Subsection (a)'s presumptions applied "where both sentences are for Federal offenses" and where "a person sentenced for a Federal offense * * * is *already serving* a term of imprisonment for a State offense." *Ibid.* (emphasis added).[14]

The National Commission used a similar construction, with a grant of authority followed by a presumption. The National Commission's first subsection was entitled "Authority of Court"; the first sentence contained the grant of authority, and the next sentence stated the default rule. *National Commission Report* 291 (proposed § 3204(1)); see also *id.* at 294 (comment). (The National Commission favored a presumption of concurrent sentencing in all cases. See *id.* at 291 (proposed § 3204(1).)

In the extensive consideration of the proposal that became Section 3584(a), Congress never referred to authority to order that terms run consecutively to future sentences. The legislative history, therefore, confirms the natural reading of the text.

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[14] Previously, judge-made law presumed that federal and state sentences should run concurrently; the Senate committee recognized that its statutory proposal would "change the law" in that respect. Senate Report 127.

C. The Sentencing Commission Has Read Section 3584(a) To Apply Only To Simultaneous And "Undischarged" Terms Of Imprisonment

Congress has involved the Sentencing Commission in the process of determining when a consecutive term is appropriate, in two ways. First, Congress has directed judges considering whether to impose a consecutive or concurrent term to consider the Section 3553(a) factors, which include the Sentencing Commission's applicable policy statements. See 18 U.S.C. 3553(a)(5), 3584(b). Second, Congress has affirmatively directed the Sentencing Commission to promulgate policy statements listing some circumstances where a consecutive sentence is generally not appropriate. See note 4, *supra*.

In carrying out that function, the Commission has promulgated guidelines for when terms imposed at the same time should run consecutively, Sentencing Guidelines § 5G1.2, and for when the defendant has an "undischarged term of imprisonment," *id.* § 5G1.3. The latter guideline makes clear that it applies only when the defendant "was serving" another term when he committed the federal offense; when another crime has already "resulted" in a term of imprisonment; or "[i]n any other case involving an undischarged term of imprisonment." *Id.* § 5G1.3(a), (b) and (c); see also *id.* § 5G1.3, comment. (n.3(A)(iv)) (noting that the undischarged term may have been imposed by a state court). In more than two decades under Section 3584(a), during which time the Sentencing Commission has repeatedly revised Section 5G1.3, it has never promulgated guidelines or policy statements recommending when to order a consecutive sentence in cases where the other sentence has not been imposed but is merely anticipated.

Although the Sentencing Commission has no formal, delegated authority to interpret Section 3584, its reading of the statute is the natural one. No guidance is needed in cases that involve anticipated state sentences, because Section 3584(a) does not cover them.

D. The District Court Has No Inherent Authority To Disregard Section 3584(a)'s Limitations And Direct A Consecutive Sentence

Some courts of appeals have suggested that the district court's power to impose a consecutive-sentencing order like the one in this case comes not from Section 3584(a) but from the court's inherent authority. Those courts have opined that even if Section 3584(a) does not "directly address whether the district court may impose a federal sentence to be served consecutively to a yet-to-be-imposed state sentence," at least the statute "do[es] not prohibit it." *E.g.*, *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam).

This Court has recognized that courts imposing multiple sentences *at the same time* have long enjoyed the authority to specify whether the sentences they impose shall run concurrently or consecutively. *Ice*, 555 U.S. at 168-169. But even that power, which essentially is the power to determine the length of the total sentence, is limited. A court has no inherent authority to impose a sentence longer than the maximum the legislature has set by statute. *E.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 (1980) ("[W]ithin our federal constitutional framework, the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress."). So too, the legislature may restrict the court's discretion to impose con-

secutive or concurrent sentences within that maximum. *Ice*, 555 U.S. at 171 (noting the "salutary objectives" that statutory limits on consecutive-sentencing discretion serve) (citation omitted). In Section 3584(a) itself, for instance, Congress precluded courts from imposing consecutive terms for an attempt crime and the object of the attempt. That substantive limitation is well within Congress's power to define federal crimes and prescribe the punishment for those who commit them. The same is true of Section 3584(a)'s scope limitation, which precludes courts from relying on any asserted inherent power to run sentences consecutively to anticipated future sentences that may be imposed by another court or another sovereign. Indeed, even before Section 3584(a) took effect, courts had no clear authority to order consecutive service of such sentences. Compare *United States* v. *Eastman*, 758 F.2d 1315, 1318 (9th Cir. 1985), and *Salley* v. *United States*, 786 F.2d 546, 548-549 (2d Cir. 1986) (Newman, J., concurring in the judgment), with *Salley*, 786 F.2d at 547-548. Congress's adoption of Section 3584(a), which limits such authority to the two specified situations, has now resolved the question.[15]

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[15] Once both courts have imposed sentence, the BOP has "plenary control, subject to [the] constraints" of 18 U.S.C. 3621(b) (2006 & Supp. III 2009), over where the federal sentence will be served and when it will commence. *Tapia* v. *United States*, 131 S. Ct. 2382, 2390 (2011). Using that authority, the BOP may permit a federal defendant to serve his federal sentence in state custody—effectively, to serve his sentences concurrently. See pp. 30-36, *infra*.

II. SECTION 3584 APPROPRIATELY LEAVES THE TREATMENT OF FUTURE SENTENCES TO THE LATER-SENTENCING COURT AND TO THE SOVEREIGN CUSTODIANS

Under the legal framework that governs sentencing and imprisonment, the appropriate time to specify the relationship between sentences comes at or after the imposition of the later sentence. That process may occur in the later-sentencing court, which can take all the earlier sentences into account and determine the total quantum of punishment that the defendant should receive. Or it may occur in the prison systems of the sovereigns who incarcerate the defendant, which can reach accommodations with each other and effectively credit one sentence against another or, alternatively, require sequential service. The availability of those avenues confirms that Section 3584(a) does not empower the earlier-sentencing court to impose sentence to make the consecutive-sentencing decision in advance.

A. The Later-Sentencing Court Is Better Positioned To Consider Whether The Defendant's Terms Should Run Consecutively

When a defendant is sentenced on a later charge before he completes his sentence on an earlier charge, the second sentencing court can take full account of the defendant's "background, character, and conduct." *Pepper*, 131 S. Ct. at 1241 (quoting 18 U.S.C. 3661). Those considerations include his previous offenses and his undischarged term for previous offenses.

Where the second court is a federal court, Section 3584(a) expressly gives the court the authority to run the new term of imprisonment concurrently with the

"undischarged" one, or consecutively to it. But even courts that lack such authority to impose a concurrent sentence—such as state courts—can still take account of the first sentence. The second sentencing court knows the facts that the first sentencing court, looking into the future, could not know for certain, see p. 16, *supra*: the nature of both offenses; the fact that the defendant was convicted of both; the degree of factual overlap between the offenses; and any changes in the defendant's situation after the first sentencing, such as unusual post-sentencing rehabilitation (see *Pepper*, *supra*) or disciplinary problems while incarcerated.

Knowing these facts, the second sentencing judge may be able to impose a suspended sentence or a sentence of probation if that judge sees no need for additional incremental punishment and the applicable law permits. Or the second judge can impose a term of imprisonment, but with "a discount * * * on account of [the] undischarged federal sentence." *Romandine* v. *United States*, 206 F.3d 731, 738 (7th Cir. 2000); accord, *e.g.*, Sentencing Guidelines § 5G1.3(b)(1) & comment. (n.2(C)-(D)) (when an earlier offense for which the defendant is still serving the sentence affects the calculation of the second sentence, the district court reduces the second sentence to account for "any period of imprisonment already served" on the first sentence).[16] In either of those ways, the second judge can make the second sentence "concurrent in practical effect." *Romandine*, 206 F.3d at 738. It is the second judge who assesses whether the defendant's sentences are duplica-

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[16] The Guidelines also expressly provide for a downward departure based on a previous sentence that the defendant has completed serving. Sentencing Guidelines §§ 5G1.3 comment. (n.4), 5K2.23, p.s.

tive and whether the second term of imprisonment should be adjusted accordingly. See, *e.g.*, *Witte* v. *United States*, 515 U.S. 389, 405 (1995) (noting the role that Sentencing Guidelines § 5G1.3 plays at a second sentencing in mitigating any duplication with the first). Conversely, the second judge can impose a sentence that exceeds the time remaining on the earlier sentence and thus, in practical effect, will have to be served at least partially consecutively.

When the second sentence is imposed in a jurisdiction that uses discretionary parole, as Texas does, the parole authorities may likewise take account of the earlier federal sentence (and the judge may impose a sentence with parole in mind). Indeed, petitioner served only about two and a half years of his ten-year sentence for the October 2007 drug offense before Texas paroled him and he began serving his federal sentence based on the same conduct.

The second sentencing judge may, out of comity, give weight to the first sentencing judge's view that the first sentence ought to be served consecutively or concurrently. But as this case illustrates, the first judge may not have anticipated developments that take place after the first sentencing. Here, the federal court expected that the state sentences would not be concurrent, so that the federal sentence could run consecutively to one but not the other, and the court ordered accordingly. But the state court then imposed concurrent sentences on both state charges. The second judge is better positioned to take account of such developments, which come after the first sentencing judge has imposed sentence and, at least in the federal system, would not be grounds

to modify the first sentence. See 18 U.S.C. 3582(c); Fed. R. Crim. P. 35(a), 45(b)(2).

B. The Sovereigns With Custody Over A Defendant May Make A Sentence Effectively Concurrent Or Consecutive

When a defendant receives two different sentences from two different sovereigns, the decision whether those sentences shall be concurrent or consecutive involves more than just an order of one or both sentencing courts. For a defendant to serve his sentences concurrently, one sovereign must agree to count time spent in the custody of the other. That decision goes not to the length of the sentence, but to when it commences and how and where it is carried out, and it is a quintessentially executive function, performed in the federal system by officers of the Department of Justice.

When a federal sentence is imposed first and a state sentence second, Section 3584(a) appropriately leaves to the Executive Branch the question of how to coordinate the two sentences, if necessary. Congress has given the BOP substantial discretion to decide where an inmate serves his sentence, 18 U.S.C. 3621(b) (2006 & Supp. III 2009), and it may exercise that discretion to allow the inmate to serve his federal sentence in state custody—during which time his state sentence is also running. Conversely, if an inmate is serving his sentence in federal custody, a State may decide to count that time against a subsequently imposed state sentence, if its own procedure permits. See, *e.g.*, N.Y. Penal Law § 70.30(2-a) (McKinney Supp. 2011); 730 Ill. Comp. Stat. 5/5-4.5-50(e) (West Supp. 2011).

1. The BOP has statutory discretion to allow a federal prisoner to serve his state sentence concurrently

"After a district court sentences a federal offender, the Attorney General, through [the] BOP, has the responsibility for administering the sentence." *Wilson*, 503 U.S. at 335. As part of that responsibility, the BOP decides where to incarcerate federal prisoners once their sentences commence. 18 U.S.C. 3621(b) (2006 & Supp. III 2009). The BOP may designate a state facility if it chooses. See *ibid.* (BOP may designate a suitable facility "whether maintained by the Federal Government or otherwise"). Although Congress has set out several factors that the BOP weighs in deciding which facility to designate for service of a sentence, *ibid.*, the BOP has "plenary control, subject to [those] statutory constraints, over 'the place of the prisoner's imprisonment.'" *Tapia* v. *United States*, 131 S. Ct. 2382, 2390 (2011) (citation omitted); see Senate Report 142.

And when federal and state governments have competing claims to a single inmate, the BOP acts as the Attorney General's delegate in working with the States to accommodate the sovereign interests of each. See *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922) ("In that officer [the Attorney General], the power and discretion to practice the comity in such matters between the federal and state courts is vested."); 28 C.F.R. 0.96(c) (delegation of Attorney General's authority to the BOP).

The concept of primary custodial jurisdiction is the longstanding rule of comity by which different sovereigns in the American system accommodate each other's claims to try, convict, sentence, and imprison the same defendant. *Ponzi*, 258 U.S. at 260-261. The sovereign that first arrests the defendant has primary jurisdiction

over him until that sovereign relinquishes it—*e.g.*, by suspending custody through bail or release on recognizance, or by terminating custody upon acquittal or completion of sentence—or voluntarily agrees to transfer primary jurisdiction to another sovereign. See, *e.g.*, *Poland* v. *Stewart*, 117 F.3d 1094, 1098 (9th Cir. 1997), cert. denied, 523 U.S. 1082 (1998).

Another sovereign may request to "borrow" the defendant from the sovereign with primary jurisdiction, often by obtaining a writ of habeas corpus ad prosequendum. Federal courts have had the authority to issue such writs since the first Judiciary Act, and the authority is now codified in 28 U.S.C. 2241. See generally *United States* v. *Mauro*, 436 U.S. 340, 357-358 (1978). When a sovereign lends a prisoner in response to a writ ad prosequendum, however, that sovereign retains primary custodial jurisdiction. See *Jake* v. *Herschberger*, 173 F.3d 1059, 1061 n.1 (7th Cir. 1999); *United States* v. *Evans*, 159 F.3d 908, 912 (4th Cir. 1998); *Causey* v. *Civiletti*, 621 F.2d 691, 693 (5th Cir. 1980).

When the United States borrows a prisoner from a State and obtains a conviction and sentence of imprisonment, the federal sentence does not commence automatically. A federal sentence commences when the defendant is administratively determined to have been "received in custody awaiting transportation to * * * the official detention facility at which the sentence is to be served," or when he "arrives voluntarily" at that facility. 18 U.S.C. 3585(a). Ordinarily, a defendant who is in primary state custody but is borrowed by the United States is not "received in custody" by the BOP until the State yields its primary custody, which may not occur until the state sentence is completed. If, however, the BOP

agrees to designate the state facility as the place for service of the federal sentence, the BOP may administratively deem the defendant to have been "received in custody" under Section 3585(a), and that action starts the federal sentence while the defendant is still in state custody.

When a defendant is in primary federal custody at the time of conviction and sentencing, he is "received in custody" when the sentence is imposed and he is remanded to the United States Marshal. The BOP will decide where he is to serve that sentence. 18 U.S.C. 3621(b) (2006 & Supp. III 2009). If the defendant wishes to serve a state sentence concurrently with the federal sentence, then either the State must agree to credit the time the defendant served in a federal facility, see p. 30, *supra*, or the BOP must agree to designate the state facility as the place for service of the federal sentence, seek the State's agreement to accept the defendant, and send him there if the State agrees. See, *e.g.*, 18 U.S.C. 3623 (allowing the BOP discretion to transfer a federal prisoner to the custody of a State whose executive authority requests the transfer).

Sometimes a defendant completes his state sentence, arrives at a BOP facility, and only then asks that his state time be credited against his federal sentence. The BOP has agreed to entertain requests for such a "*nunc pro tunc* designation" of the state facility as the place for service of the federal sentence. See generally U.S. Dep't of Justice, BOP, *Program Statement 5160.05: Designation of State Institution for Service of Federal Sentence* § 9(b)(4), at 5-6 (Jan. 16, 2003), http://www.bop.gov/policy/progstat/5160_005.pdf (*Designation Program*

Statement); *Barden* v. *Keohane*, 921 F.2d 476, 480-483 (3d Cir. 1991).[17]

In making such a determination, the BOP considers the factors set out in Section 3621(b), which include "the nature and circumstances of the offense," "the history and characteristics of the prisoner," any applicable Sentencing Commission policy statement, and the views of the sentencing court. 18 U.S.C. 3621(b)(2)-(5). To assess these factors, the BOP can obtain information that would not be available to the court that first pronounced sentence on the defendant, such as the defendant's disciplinary history while in custody and assessments of his institutional adjustment. *Designation Program Statement* § 8(a) at 4. The BOP also gives considerable weight to the views of the sentencing court itself.

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[17] The earliest date a federal sentence can commence, however, is the date that it was imposed. See, *e.g.*, *Coloma* v. *Holder*, 445 F.3d 1282, 1284 (11th Cir. 2006) (per curiam) (applying 18 U.S.C. 3585(a)). Thus, in cases like this one, neither a district court's concurrent-sentencing order nor the BOP's *nunc pro tunc* procedure would enable an inmate to obtain credit for *all* of the time spent in state custody. Petitioner received credit toward his state sentence for the period beginning October 1, 2007, when he was arrested. J.A. 30, 36. The federal district court imposed petitioner's sentence on August 22, 2008, and the sentence began running on March 17, 2010, when he was paroled to federal custody. If the district court's order were reversed, the BOP would have discretion to treat petitioner's sentence, *nunc pro tunc*, as commencing at most approximately 19 months earlier, on the date of his federal sentencing. Although time spent in custody before the federal sentencing can sometimes result in prior-custody credit against the federal sentence, petitioner cannot receive prior-custody credit for the time following his state arrest because that time has already "been credited against another sentence" by the State. 18 U.S.C. 3585(b); see *Wilson*, 503 U.S. at 334.

Id. § 9(b)(1)-(3) at 4-5.[18] If Section 3584(a) applies but the district court entered no order or recommendation and did not otherwise indicate its intent, the BOP applies the same presumptions set out in Section 3584(a)'s second and third sentences: terms imposed at the same time run concurrently, but a later federal sentence runs consecutively to an earlier, undischarged state sentence. If the federal sentence was imposed first and, as a result, the district court entered no order under Section 3584(a), the court may have made a recommendation in the judgment or otherwise made its views known on the record. If not, BOP affirmatively solicits the original sentencing judge's views by letter, if that judge is available. *Id.* § 9(b)(4)(c), (4)(e) and (5)(a) at 6, 7.[19]

If the BOP denies a request for a *nunc pro tunc* designation, an inmate in a federal institution may challenge that denial through the BOP's administrative rem-

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[18] Similarly, if the sentencing court recommends that the inmate be imprisoned at a particular BOP facility, the BOP will consider that recommendation but will not be bound by it. See 18 U.S.C. 3621(b)(4); *Tapia*, 131 S. Ct. at 2390-2391; U.S. Dep't of Justice, BOP, *Program Statement P5100.08: Inmate Security Designation and Custody Classification*, Ch. 1, at 1 (Sept. 12, 2006), http://www.bop.gov/policy/progstat/5100_008.pdf; *id.* Ch. 3, at 3, 4; see also Fed. R. Crim. P. 38(b)(2).

[19] Because years may have passed between the time of sentencing and the time of the request, the sentencing court's views may have changed. See, *e.g.*, *Reynolds* v. *Thomas*, 603 F.3d 1144, 1147 (9th Cir. 2010) (on BOP's third request, more than six years after federal sentencing, federal sentencing judge concluded that "the objectives of sentencing have * * * been largely met" and did not oppose a designation that would permit concurrent service of federal and state sentences), petition for cert. pending, No. 10-7502 (filed Nov. 12, 2010).

edy process. See 28 C.F.R. 542.10 *et seq.*[20] Federal courts have reviewed those determinations, pursuant to habeas petitions under 28 U.S.C. 2241, but have accorded great deference to the BOP's "broad discretion." *Barden*, 921 F.2d at 478.

2. Consecutive-sentencing orders that are not authorized by Section 3584(a) wrongly limit the BOP's discretion to agree to a concurrent sentence

A formal order by the district court, pursuant to Section 3584(a), that federal and state terms of imprisonment are to be served consecutively precludes the BOP from exercising discretion to permit those terms to be served concurrently. *Designation Program Statement* § 9(b)(4)(f) at 6-7. In cases like this one, the district court has imposed such an order even though, in the government's view, the order is not authorized by Section 3584(a). Because circuit precedent holds that the district court does have such authority, the BOP (despite its disagreement with that precedent) as a matter of policy does not seek to challenge those orders administratively by making *nunc pro tunc* determinations that would be inconsistent with the court's orders. As a result, when the district court formally orders consecutive service, the defendant may not thereafter obtain a favorable exercise of BOP's discretion.[21]

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[20] If the inmate requests that the BOP designate a state facility while he is still in state custody, but the BOP denies the request, he can still invoke the administrative-remedy procedure and seek *nunc pro tunc* relief once he arrives at a federal institution.

[21] Petitioner has not asked the BOP to exercise its discretion to grant him a favorable *nunc pro tunc* determination. If he did, as the government noted at the certiorari stage (Br. in Opp. 13-14), the BOP might well conclude that the district court's sentencing order is ambiguous

In many cases, a district court's order precluding the BOP from granting a *nunc pro tunc* designation will not differ in practical effect from a district court's recommendation that the BOP deny the designation.[22] In this case, the district court might well adhere to its view that petitioner's state sentence for violating his probation should run consecutively to his federal sentence. Cf. Sentencing Guidelines § 5G1.3 comment. (n.3(C)); *id.* § 7B1.3 comment. (n.4). And the BOP would give weight to the court's view. See pp. 34-35, *supra*.

Nonetheless, an order and a recommendation are sufficiently different that petitioner, who preserved his objection to the order, is entitled to reversal. Cf. *Tapia*, 131 S. Ct. at 2391. Where Section 3584(a) does not permit the district court to order a consecutive sentence, Congress gave the BOP responsibility to decide whether to place the prisoner in a federal or a state facility, and it made the federal court's view one factor among many. 18 U.S.C. 3621(b)(4). The other factors include matters that the court imposing the first term of imprisonment is not well positioned to assess, such as the inmate's history. See pp. 16, 27-29, *supra*; cf. *Wilson*, 503 U.S. at 334 (under the Sentencing Reform Act, the Attorney

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and does not expressly preclude petitioner from seeking relief. The order does not specifically address the circumstance that ultimately transpired here: the decisions of the state court and the state parole authority made it impossible for petitioner to serve his federal term as the federal court ordered, *i.e.*, concurrently with one state term but consecutively to the other. If the BOP concludes that a sentencing order is ambiguous, it seeks clarification from the sentencing judge.

[22] If this Court holds in this case that the district court lacked authority to enter the consecutive-sentencing order, in the future the BOP would still treat such orders as recommendations to be given appropriate weight. See *Tapia*, 131 S. Ct. at 2390-2391.

General, not the district court, awards sentencing credit for pretrial or presentencing custody, matters about which "the [court] could only have speculated" at the time of sentencing). Section 3584(a) and Section 3621(b) were both enacted as part of the Sentencing Reform Act, and they are properly viewed as working harmoniously together. See *Reno* v. *Koray*, 515 U.S. 50, 56-57 & n.3 (1995). Reversing the judgment below and allowing petitioner to ask the BOP to treat his federal sentence as starting on the date when it was imposed, when he was in state custody, is the outcome consistent with Congress's allocation of responsibility to the Executive Branch.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3584 provides:

Multiple sentences of imprisonment

(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

2. 18 U.S.C. 3621 provides in pertinent part:

Imprisonment of a convicted person

(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse. Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.

* * * * *

REPLY BRIEF

No. 10-7387

In the Supreme Court of the United States

MONROE ACE SETSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The governing statute, 18 U.S.C. 3584(a), provides that terms of imprisonment "may run concurrently or consecutively" if either of two conditions is met: "[i]f multiple terms of imprisonment are imposed on a defendant at the same time," and "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." Neither condition is met here. Indeed, the amicus curiae appointed by this Court to defend the judgment essentially concedes that *nothing* in Section 3584(a)—including the provisions relied upon by some lower courts—gave the federal district court authority to direct that petitioner's federal term run consecutively to his then-anticipated state term, and thus to preclude the Federal Bureau of Prisons (BOP) from allowing petitioner to serve a portion of his federal term in a state facility. Section 3584(a), amicus agrees, applies only to simultaneously imposed terms and undischarged terms.

Instead, amicus contends that the district court enjoyed inherent, extrastatutory authority to impose an anticipatory consecutive-sentencing order and that any effort by Congress to withdraw that authority would raise grave constitutional questions. Accordingly, amicus contends, this Court should deem a court's anticipatory-sentencing order to be entirely unregulated by Section 3584(a), including that provision's substantive limitations. Both the premises and the conclusion are mistaken.

By granting federal courts only a limited power to order consecutive or concurrent terms, Section 3584(a) does not infringe on any inherent judicial sentencing authority. Petitioner faces a 151-month federal sentence; the interpretive question in this case concerns not how much of it he will serve, but *where* he may serve it (in a federal facility only, or a federal or state facility in the BOP's discretion) and *when* it may commence (only after service of his state sentence, or at an earlier time). The Constitution does not assign the latter decisions to federal trial courts. To the contrary, those decisions can appropriately be made by the BOP, they were routinely made by the BOP at the time Section 3584(a) was enacted, and they have been made by the Executive Branch since before the first federal civilian prison was built.

Section 3584(a) imposes a modest but important limitation, which ensures that the first court to impose sentence will not tie the second court's hands based on predictions about how the second case will turn out. The natural reading of Section 3584(a) gives proper effect to that limitation and does not approach the boundary between the Branches. On that natural reading, petitioner is entitled to reversal.

A. Section 3584(a) Precludes A Consecutive-Sentencing Order When The Defendant Faces A Future Term

1. Section 3584(a)'s first sentence imposes limits on courts' consecutive-sentencing orders

As explained in the government's opening brief (at 10-15), the first sentence of Section 3584(a) sets out two limitations: a scope limitation and a substantive limitation. First, the court may not order terms of imprisonment to run concurrently or consecutively unless "multiple terms of imprisonment are imposed on a defendant at the same time" or "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." See U.S. Br. 10-14. Second, the court may not order that two terms "run consecutively for an attempt and for another offense that was the sole objective of the attempt." See *id.* at 14-15. Those limitations govern district courts' orders that sentences run consecutively or concurrently. The second and third sentences then set out presumptions that apply when district courts have authority to impose such an order, but do not do so.

If the scope limitation means what it says, it compels reversal here. Petitioner received only one federal term of imprisonment, and he was not "already subject to an undischarged term of imprisonment."[1] Section 3584(a) therefore precluded the district court from ordering that petitioner serve his federal term of imprisonment consecutively to specified future Texas terms.

Amicus does not argue that, as some lower courts have held (U.S. Br. 12-13), the district court's power to impose a consecutive-sentencing order in a case like this one comes

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[1] Amicus does not argue that petitioner's term of probation or his pretrial custody was an "undischarged term of imprisonment." See U.S. Br. 12 n.2; Pet. Br. 33-36.

from Section 3584(a)'s third sentence. See Amicus Br. 22-23 (listing this as "[a] fourth plain-text approach" but not endorsing it). That approach is unsustainable because it reads the third sentence to allow what the first sentence precludes: it would allow consecutive-sentencing orders in the absence of "multiple terms of imprisonment" or "an undischarged term of imprisonment," and it would even allow consecutive sentences for attempt crimes and their objects, which the first sentence expressly forbids. U.S. Br. 12-15.[2]

2. Amicus's argument reads those limitations out of the statute

Rather than rely on Section 3584(a)'s third sentence, amicus makes a broader argument: that Section 3584(a) does not regulate *anticipatory* consecutive- and concurrent-sentencing orders at all, because district courts have authority to impose such orders that does not derive from Section 3584(a). Thus, on amicus's view, if a district court wants to order that the defendant's term run consecutively to an undischarged term of imprisonment, or if a court wants to order that multiple terms of imprisonment run consecutively to one another, the court must comply

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[2] Amicus does argue (Br. 19-20) that because different words appear in the first sentence ("imposed on a defendant who is already subject to an undischarged term of imprisonment") and the third sentence ("imposed at different times"), those phrases should mean different things. But two paragraphs earlier, amicus agrees (Br. 19) that the two conditions in the first sentence "delineate[] the realm of the default rules of the second and third sentences," observing that "[o]f all proposed readings of the first sentence, this is the plainest." That is correct: the first sentence uses a longer formulation to establish which sequential terms of imprisonment qualify; the third sentence uses a shorthand formulation to describe the same class of qualifying terms. See U.S. Br. 11. That shorthand is not ambiguous.

with Section 3584(a) (*e.g.*, ensure that the two terms are not for an attempt crime and its sole object). But if a district court wants to order that the defendant's term run consecutively to an *anticipated* term of imprisonment, amicus contends, the district court may rely on its inherent authority and need not comply with Section 3584(a). Indeed, amicus argues that the court may order consecutive terms for an attempt crime and its object, as long as the order comes at the first sentencing and not the second. Amicus Br. 17-18, 22 n.7.

a. That reading is flawed for the same reason that some lower courts' reliance on the third sentence is flawed: it reads the first sentence out of the statute. If Section 3584(a) were properly read only to "recognize[] preexisting authority" and provide two presumptions for when the court fails to exercise that authority, as amicus argues (Br. 11-12), there would be no reason to include the first sentence at all, because it would add nothing to the second and third sentences. Amicus's reading therefore should be rejected. U.S. Br. 12-15; see, *e.g.*, *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) (statutes should not be read to "vitiate" or "render[] superfluous" limitations Congress has expressly imposed) (citation omitted).

Section 3584(a) begins not with a "passive[] recogni[tion of] preexisting authority" (Amicus Br. 11), but with an active limitation on authority to be exercised by a court (the implied actor when sentences are imposed, see pp. 7-8, *infra*). The limitation is expressed in two conditional clauses: "*If* multiple terms of imprisonment are imposed on a defendant at the same time, or *if* a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment * * * ." 18 U.S.C. 3584(a) (emphases added). Those conditional clauses modify the

independent clause, and the independent clause refers back to the conditional clauses: if one of the conditions is met, "the terms"—the ones mentioned in the conditional clauses—"may run concurrently or consecutively."

Adopting amicus's reading would leave those limitations with no function at all, because all of the work would be done by the second and third sentences. The conditional clauses would have no meaning, because terms of imprisonment could run consecutively or concurrently "*[i]f* multiple terms of imprisonment are imposed on a defendant at the same time," but also *if not*; and also "*if* a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment," but also *if not*. And the first sentence's use of "the terms," which refers back to the terms listed in the conditional clauses, would also make no sense: on amicus's view, any terms may run consecutively or concurrently, whether they are listed in the conditional clauses or not.

Amicus notes (Br. 22 n.7) that the substantive limitation—no consecutive terms for an attempt crime and its sole object—would still have some work to do, because it would sometimes prevent the presumption set out in the third sentence from applying. But Congress wrote the substantive limitation as a proviso to the *first* sentence, not the third: *if* the defendant falls within Section 3584(a)'s scope, "the terms may run concurrently or consecutively, *except that* the terms may not run consecutively for" an attempt crime and its sole object. 18 U.S.C. 3584(a) (emphasis added). Amicus gives no logical reason why Congress would have begun the subsection with a meaningless and incomplete recitation of existing law and then, at the end of the sentence, tacked on a substantive provision to qualify the *third* sentence, which the reader has not yet encountered.

The substantive limitation is also phrased in absolute terms: "the terms *may not run consecutively*" if they are for an attempt and its sole object. Yet on amicus's reading, the district court *may* order terms of imprisonment to run consecutively for an attempt and its sole object. Amicus Br. 17-18, 22 n.7. Amicus observes that any such sentence must be imposed by the judge after consideration of the sentencing factors set out in 18 U.S.C. 3553(a). But that is small comfort: *every* consecutive-sentencing order requires consideration of those factors (even, apparently, orders issued under amicus's view of the court's inherent authority). See 18 U.S.C. 3584(b); Amicus Br. 12, 17. Congress affirmatively and flatly precluded consecutive sentences for attempt and object. U.S. Br. 15. Amicus would substitute a rule allowing such sentences within the judge's ample discretion under Section 3553(a).

The better reading gives effect to each part of the first sentence: federal courts have authority to impose consecutive or concurrent terms if one of Section 3584(a)'s scope limitations is satisfied, except that terms for attempt and object crimes may not be run consecutively. If neither of the scope limitations is satisfied, or if the crimes are attempt and object, then Section 3584(a) forbids the district court to run the terms consecutively.

b. Amicus suggests (Br. 11, 17, 18) that the limitations in the first sentence do not govern a district court's authority (or do not do so with sufficient clarity) because that sentence does not use the word "court" and sometimes uses the passive voice. But the object of Congress's attention is no mystery: if the substantive limitation or the scope limitations are not satisfied, a sentencing court may not order (and Section 3584(a) will not direct) that the terms run consecutively or concurrently.

The operative provision of the first sentence provides that "if" the scope conditions are satisfied, "the terms may run concurrently or consecutively." The second and third sentences then specify which of the terms listed in the first sentence are presumptively consecutive and which are presumptively concurrent, "unless the court orders" otherwise. Because Section 3584(a) sometimes directs consecutive or concurrent terms when the court is silent, the first sentence does not need to refer to "the court": the limitations dictate whether either the court *or* the statutory default rules may order a particular set of "terms" to run consecutively or concurrently.

As for the passive voice, it appears only in the conditional clauses, which are satisfied when one or more terms of imprisonment "are imposed on a defendant." But the statute harbors no ambiguity about who imposes a term of imprisonment. In the chapter of the Criminal Code where Section 3584(a) appears, each subchapter begins with a passively phrased provision governing punishment: "[A] defendant who has been found guilty * * * shall be sentenced in accordance with the provisions of this chapter," "may be sentenced to a term of probation," "may be sentenced to pay a fine," and "may be sentenced to a term of imprisonment." 18 U.S.C. 3551(a), 3561(a), 3571(a), 3581(a). And each subchapter has its own provision leaving no doubt about who imposes the term of imprisonment, the term of probation, or the fine: "*The court*, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a)." 18 U.S.C. 3582(a) (emphasis added); see 18 U.S.C. 3562(a), 3572(a) (same, for probation and fine).

Read fairly and as a whole, therefore, Section 3584(a) sets out the exclusive conditions to impose a consecutive sentence. Those conditions are not met here.

3. Context and history confirm that Section 3584(a) is the exclusive source of courts' consecutive-sentencing authority

The suggestion that Section 3584(a) merely recognizes and silently preserves some extrastatutory sentencing power is fundamentally at odds with the sentencing statutes Congress has adopted. Congress left no such inherent authority standing.

Section 3584(a) was enacted as part of the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987. That statute was the culmination of an effort that took more than a decade; the effort began with years of study and a lengthy report by the National Commission on Reform of Federal Criminal Laws, and it also included numerous hearings in four different Congresses. S. Rep. No. 225, 98th Cong., 1st Sess. 37 (1983) (Senate Report). The law's congressional authors made plain their intent to adopt a "comprehensive statement of the Federal law of sentencing" and "describe[] in detail the kinds of sentences that may be imposed." *Id.* at 50; see *id.* at 39, 41, 59; accord, *e.g.*, *Freeman* v. *United States*, 131 S. Ct. 2685, 2694 (2011) (plurality opinion) (SRA "aims to create a comprehensive sentencing scheme").

As part of the SRA, Congress codified courts' sentencing authority down to the most basic level, including their power to impose a term of imprisonment, a fine, or a term of probation. 18 U.S.C. 3551, 3561, 3571, 3581. Perhaps no statute was needed before, see Senate Report 66 ("Section 3551," which "outlines the authorized sentences for defendants found guilty of Federal offenses," "has no direct

counterpart in current law."), but once Congress decided to codify federal courts' sentencing powers, it did so thoroughly.

The "evident care" with which Congress fashioned the sentencing statutes is a persuasive reason not to interpret Congress as having silently preserved any residual nonstatutory authority. *E.g.*, *Johnson* v. *Home State Bank*, 501 U.S. 78, 87 (1991); *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985); cf. *Carlisle* v. *United States*, 517 U.S. 416, 426-428 (1996) (finding no inherent power to order an acquittal outside the time limits of Rule 29 of the Federal Rules of Criminal Procedure, in view of "the clarity of the text"). In the consecutive-sentencing statute in particular, Congress carefully specified that federal courts would have power to direct consecutive terms in two instances: if the terms are imposed at the same time, or if the term being imposed follows another, undischarged term. The inevitable inference is that Congress did not silently reserve, or forget to address, the situation where the term being imposed *precedes* another term. Rather, the exclusion was deliberate, and it disposes of this case.

B. A District Court Has No Inherent Authority To Impose A Sentence Consecutively To A Future State Sentence

Amicus suggests that the plainest reading of Section 3584(a) should be disregarded based on a theory—variously described as a ratification of existing common law, a clear-statement rule, or a principle of constitutional avoidance—that federal judges' core sentencing authority includes the power to direct that a prisoner serve his *federal* sentence consecutively to his *nonfederal* sentence. There is no such inherent judicial power.

To the contrary, when a defendant faces a single federal sentence and a single state sentence, the question of consec-

utive or concurrent service essentially becomes the question of *where and when* the defendant will serve his sentences. Those have been matters for the Executive Branch, subject to regulation by Congress, for more than a century. Here, the BOP has statutory discretion to allow petitioner to serve a portion of his federal sentence in a Texas state facility, if the circumstances warrant. The federal district court has no such statutory authority, but has essentially ordered the BOP not to exercise *its* authority in petitioner's favor. That order cannot be sustained as an exercise of some inherent judicial power.

1. Federal district courts do not have the inherent power to decide where a defendant will serve his sentence or when that sentence will commence

Federal sentencing is "the function of determining the *scope* and *extent* of punishment." *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989) (emphasis added). Even that function, this Court has said, is a "peculiarly shared responsibility among the Branches of Government." *Id.* at 390; see *id.* at 364-365 ("Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.") (citation omitted); *United States* v. *Booker*, 543 U.S. 220, 243 (2005) (recognizing that the Sentencing Commission, when promulgating Sentencing Guidelines, acts as an "independent agency that exercises policymaking authority delegated to it by Congress"); *United States* v. *Addonizio*, 442 U.S. 178, 188 (1979) (before the SRA, "[t]he decision as to when a lawfully sentenced defendant shall actually be released [was] committed by Congress, with certain limitations, to the discretion of the Pa-

role Commission," an agency in the Executive Branch).[3] Thus, even in deciding "the scope and extent of punishment," federal courts exercise shared rather than exclusive authority. Deciding where that punishment will be carried out falls outside courts' core authority altogether.

In the ordinary criminal case, the district court imposes the sentence, enters judgment, and commits the defendant to the custody of the Attorney General (and his delegate, the BOP). The district court then has determined "the scope and extent of punishment," *Mistretta*, 488 U.S. at 364, and from that point, "the Attorney General, through [the] BOP, has the responsibility for administering the sentence." *United States* v. *Wilson*, 503 U.S. 329, 335 (1992). In particular, the BOP has "plenary control" over where the defendant shall serve his term of imprisonment. *Tapia* v. *United States*, 131 S. Ct. 2382, 2390 (2011). The BOP has discretion to choose "any" facility that is available and suitable, "whether maintained by the Federal Government or otherwise." 18 U.S.C. 3621(b) (2006 & Supp. III 2009). The district court may make a recommendation about what facility or type of facility to choose, see 18 U.S.C. 3582(a), 3621(b)(4)(B), but the BOP is not obliged to follow that recommendation, see 18 U.S.C. 3621(b)(1)-(5); *Tapia*, 131 S. Ct. at 2390-2391. If the court does make a recommendation, that recommendation is not treated as part of the sentence. *E.g.*, *United States* v. *Ceballos*, No. 09-50502, 2011 WL 5304111, at *3 (9th Cir. Nov. 7, 2011) (collecting cases).

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[3] Amicus suggests (Br. 27, 31) that parole violated the separation of powers, but cites no authority that would actually invalidate that long-standing practice. See, *e.g.*, *Geraghty* v. *United States Parole Comm'n*, 719 F.2d 1199, 1210-1212 (3d Cir. 1983) (rejecting such a challenge), cert. denied, 465 U.S. 1103 (1984).

Similarly, federal district courts have no authority to order the BOP to commence a sentence, or to refrain from doing so. For example, if the federal government "borrows," tries, and convicts a state pretrial detainee, pursuant to a writ of habeas corpus ad prosequendum, the defendant will ordinarily return to state pretrial detention and his federal sentence will not commence. The district court cannot order otherwise. See 18 U.S.C. 3585(a); *United States* v. *Hayes*, 535 F.3d 907, 909-910 (8th Cir. 2008), cert. denied, 129 S. Ct. 1983 (2009); *United States* v. *Wells*, 473 F.3d 640, 645 (6th Cir. 2007).

2. ***Federal courts have no inherent authority to order that a federal sentence and a state sentence run consecutively or concurrently***

That statutory backdrop comprehensively refutes amicus's argument that running federal and state sentences consecutively is a "core" exercise of federal "judicial power." Federal courts impose a federal sentence and commit the prisoner to the BOP's custody to serve it. Thus, the district court sentenced petitioner to 151 months of imprisonment, and he will serve 151 months (minus good conduct time, see 18 U.S.C. 3624(b)(1)) on that sentence—no matter where he serves it.

Absent the district court's order in this case, the BOP could have designated a state prison for petitioner's confinement, 18 U.S.C. 3621(b) (2006 & Supp. III 2009); it could have transferred petitioner from federal custody to state custody, 18 U.S.C. 3623; or, now that petitioner has served his state sentence, it could designate the state prison *nunc pro tunc*, effective on the date of the federal sentenc-

ing, and thus credit the time spent in state custody against petitioner's federal sentence. U.S. Br. 33-34 & n.17.[4]

The BOP's exercise of that discretion would not change the amount of time that petitioner serves on his federal sentence, although it would change the total amount of time that petitioner spends *in custody*, and for that reason is important to inmates in petitioner's position. For that reason, amicus is fundamentally incorrect to characterize the BOP's decision (Br. 25) as "sentencing" or as "[d]etermining a sentence's *length*"; it is instead a judgment about where and when the sentence shall be carried out. That is squarely within the BOP's authority under Section 3621(b).

Section 3584(a) does give federal courts a role in that decision in the specified circumstances. Thus, when a federal defendant has an undischarged state term, Section 3584(a) allows the federal court to direct the BOP not to credit toward the federal term any time spent serving the state term. But to say that Congress has granted federal district courts a limited role in deciding where and when a federal term is served, in two statutorily specified circumstances, is not to say that those decisions are part of inherent judicial power, in all circumstances. Except where it has specified otherwise, Congress has long assigned those decisions to the BOP.

For that reason, amicus is wrong to suggest that if Section 3584(a) bars the court from imposing an anticipatory consecutive sentence, it must also bar the BOP from doing so. The BOP has statutory authority in all cases to designate a state or federal facility, 18 U.S.C. 3621(b) (2006 & Supp. III 2009), unless it is directed pursuant to Section 3584(a) not to exercise that authority. In cases like this

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[4] The designation by the BOP triggers the commencement of the federal sentence under 18 U.S.C. 3585(a).

one—in which the state term is imposed second but served first, and in which Section 3584(a) therefore does not apply—effecting *concurrent* terms would require an affirmative request by the prisoner and a decision by the BOP to designate the state facility. Unless such a request is made and granted, the sentences effectively run consecutively, because the prisoner is not transported to BOP custody to begin his federal sentence until after he serves his state sentence. Section 3584(a) has no effect on that result.[5]

Amicus calls the practice of judicial recommendations "intolerable," because of the possibility that the BOP might reach a conclusion different from the judge's recommendation. Amicus Br. 48-49. But amicus then acknowledges (*id.* at 49 n.21) the propriety of that practice "in an area that is *not* judicial in nature—such as the location of the facility in which BOP may wish to confine the prisoner." The distinction amicus proposes does not exist: the consecutive-sentencing decision here *is* a decision about where to confine the prisoner. Federal statutes have long permitted (not required) federal courts to make recommendations about that decision, but given the decisionmaking authority to the BOP. See 18 U.S.C. 3582(a), 3621(b)(1)-(5); *Tapia*, 131 S. Ct. at 2390-2391.

Indeed, the Attorney General has played a principal role in such decisions since before there were federal prisons, when the Attorney General had to designate state prisons for service of federal sentences. See *Ex parte Karstendick*, 93 U.S. 396, 400-401 (1876). In *Karstendick*, the Court

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[5] Contrary to amicus's statement (Br. 19), the BOP is not "bound by § 3584(a)" to apply the default rules for cases involving multiple terms or undischarged terms. As a matter of discretion, however, when the sentencing court's intent remains wholly ambiguous in a situation that would be governed by Section 3584(a), the BOP has chosen to resolve the ambiguity by looking to Section 3584(a)'s default rules. U.S. Br. 35.

noted that the prisoner "conceded that Congress has the power to provide that persons convicted of crimes against the United States in one State may be imprisoned in another." *Id.* at 400. Indeed, the Court observed, "Congress can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there; or it may arrange with a single State for the use of its prisons, and require the courts of the United States to execute their sentences of imprisonment in them. All this is left to the discretion of the legislative department of the government, and is beyond the control of the courts." *Ibid.*

Thus, at the time of the SRA's enactment, a federal statute gave the Attorney General discretion to designate a place of imprisonment and specified that the term would run *only* from the date a prisoner was committed to await transportation to that place. 18 U.S.C. 3568, 4082 (1982). As a result, the courts generally held that a federal court could not order that a federal sentence be served concurrently with a state sentence: it was up to the Attorney General to make that determination by designating a state facility if he chose, and the court was limited to making a recommendation. See, *e.g.*, *United States* v. *Segal*, 549 F.2d 1293, 1301 (9th Cir.) ("[T]he district judge has no authority to impose a federal sentence concurrent with a state sentence because a federal term cannot begin until a prisoner has been received by federal authorities."), cert. denied, 431 U.S. 919 (1977); *Gomori* v. *Arnold*, 533 F.2d 871, 875 (3d Cir.) ("A federal court has no power to direct that a federal sentence shall run concurrently with a state sentence."), cert. denied, 429 U.S. 851 (1976).

Amicus offers a handful of cases that purportedly recognize inherent authority to impose a federal sentence consec-

utively to a state sentence. Amicus Br. 13-15. But for the most part, the district courts in those cases do not appear to have forbidden the BOP from doing anything, including designating the state prison as the federal place of confinement. Rather, they simply recognized that the State had primary custody of the defendant, and that the federal sentence would start when the State relinquished that custody at the end of the state sentence. See 18 U.S.C. 3568 (1982) (pre-SRA statute governing commencement of sentence); 18 U.S.C. 3585(a) (current statute). Until that time, the defendant could not make his federal sentence start running. See, *e.g.*, *United States ex rel. Lester* v. *Parker*, 404 F.2d 40, 41 (3d Cir. 1968) (federal sentence was "to commence upon [defendant's] release from the custody of the Commonwealth of Pennsylvania"); *Anderson* v. *United States*, 405 F.2d 492, 493 (10th Cir.) (per curiam) ("Viewing this question in light of 18 U.S.C. § 3568 and in the light of the unanimity of conclusion reached in the cases to which reference has been made, we think it is clear that the sentence imposed by the United States District Court began to run from the date Anderson was actually delivered to federal custody for service of his federal sentence."), cert. denied, 394 U.S. 965 (1969).[6] As amicus acknowledges (Br. 15), the defendants primarily challenged those orders not

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[6] The district court in *Anderson* did state that the federal sentence "shall run consecutive to any confinement under which defendant is being held by state authorities." 405 F.3d at 492. But the issue in the case was Anderson's contention that a federal sentence must commence "immediately on imposition," even when the defendant is in the primary custody of another sovereign, or else be too indefinite. *Id.* at 493; *United States* v. *Anderson*, 279 F. Supp. 706, 706 (W.D. Okla. 1968), aff'd, 405 F.2d 492 (10th Cir.), cert. denied, 394 U.S. 965 (1969). The courts rejected that contention.

as *ultra vires*, but as unlawfully vague. *E.g.*, *Lester*, 404 F.2d at 41-42; *Anderson*, 405 F.2d at 493.

3. *The court's authority to make existing federal sentences consecutive does not support amicus's argument*

Amicus's appeal to inherent authority rests principally on incorrectly equating petitioner's situation (an order to serve federal and state sentences consecutively) with an order to serve multiple *federal* sentences consecutively. When the court itself imposes multiple sentences at the same time, consecutive treatment does affect the total quantum of punishment. Indeed, in some cases the court's ability to run the sentences consecutively instead of concurrently is the only reason why a sentence does not exceed the statutory maximum. See Sentencing Guidelines § 5G1.2(d).

Thus, as amicus notes (Br. 16), before Congress codified consecutive-sentencing authority, federal courts held that they had the power to stack a series of sentences that they themselves imposed at the same time. See *Swepston* v. *United States*, 289 F.2d 166, 167-169 (8th Cir. 1961), cert. denied, 369 U.S. 812 (1962); *Sherman* v. *United States*, 241 F.2d 329, 336-337 (9th Cir.), cert. denied, 354 U.S. 911 (1957). This Court noted the common-law origins of that power in *Oregon* v. *Ice*, 555 U.S. 160, 168-169 (2009). That authority, however, is of no relevance here, for three reasons.

First, where separate crimes against separate sovereigns are involved, the federal court's inherent authority to prescribe the quantum of punishment is limited to the federal term. The federal sentence may be informed by the defendant's criminal history (federal and state) and by the length of time that the defendant will be incarcerated and thus unable to commit further crimes against the public. 18

U.S.C. 3553(a)(1) and (2)(C). But the federal court's function is to impose punishment for the federal crime. The federal court has no inherent authority to punish petitioner for violating the Texas Health and Safety Code. And even when, pursuant to Section 3584(a), the court prescribes that the federal term shall run consecutively to an undischarged state term, the federal court has no control over the length of the state term.

Second, even for sentencing within the same system, a federal court has no inherent power to anticipate a future sentence and to prescribe the relationship between the actual sentence and the anticipated one. Indeed, as explained in the opening briefs, the reading of Section 3584(a) adopted by the courts below seemingly creates the significant problem of empowering federal district judges to impose anticipatory consecutive-sentencing orders on one another. See Pet. Br. 27-28; U.S. Br. 18-19. Amicus acknowledges (Br. 42-43) that a federal sentence that purports to anticipate (and run consecutively to) a future federal sentence would present significant practical problems, but he contends that Section 3584(a) presents no obstacle to the imposition of such a sentence. Rather, he contends that such a sentence would be "categorically unreasonable" under the Section 3553(a) factors, or should be forbidden by the courts of appeals in the exercise of their supervisory power. The correct solution lies closer at hand: Section 3584(a) precludes such consecutive-sentencing orders, because it does not authorize them.

Third, even if petitioner's cases supported the notion that federal courts had inherent authority to direct that a sentence run consecutively to a future state sentence, nothing in those cases suggests that Congress cannot withdraw that authority and replace it with more definite, statutorily defined authority. See *Carlisle*, 517 U.S. at 426 ("Whatever

the scope of [courts'] 'inherent power,' however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure."). Indeed, *Ice* concerned a statute that precluded judges from imposing consecutive terms except in cases meeting certain criteria. That restraint on discretion, the Court emphasized, was a "salutary" one, because it promotes proportionality in sentencing. 555 U.S. at 171 (citation omitted).

C. The Natural Reading Of Section 3584(a) Preserves An Appropriate Role For The First Sentencing Court

Reading Section 3584(a) to authorize, or even to leave in place an asserted power to impose, anticipatory consecutive sentences would saddle sentencing judges with a difficult task. As amicus agrees, the judge cannot simply choose arbitrarily between consecutive and concurrent terms, but must consider the Section 3553(a) factors in making such a decision. Yet the first judge to impose sentence cannot foresee the future: she will not know whether there will be a second term of imprisonment, or how long it might be; but she must still assess how the term of imprisonment she is imposing should interact with the second, anticipated term. The very nature of the Section 3553(a) factors suggests that Congress did not intend for sentencing judges to make such anticipatory decisions. U.S. Br. 15-17.

Amicus contends (Br. 34) that "in many anticipatory contexts" district courts will be able to make these judgments, because sometimes the call will be easy (*e.g.*, concurrent sentences for overlapping conduct; consecutive sentences for an offense that caused parole to be revoked and for the revocation itself). This case might well have been an easy one. U.S. Br. 17 n.5. But the point is that the Section 3553(a) factors govern *all* consecutive-sentencing decisions, not just the easy ones; where the court needs to make a

meaningful comparison of the two offenses and the two terms of imprisonment, it cannot do so, because the second term does not yet exist.

Where the prediction seems easy at the time of sentencing, the district court can make a recommendation consistent with that prediction. The BOP's practice, consistent with the statute, is to give those recommendations respectful weight. But in some cases, the relevant considerations will have changed by the time a prisoner actually seeks concurrent treatment, *i.e.*, after both terms of imprisonment have actually been imposed. Under those circumstances, if the defendant faces a second federal sentence, he can ask the *second* judge for concurrent treatment, as Section 3584(a) expressly authorizes. And where Section 3584(a) does not apply, the BOP's statutory authority under Section 3621(b) allows it to weigh the relevant considerations and make an informed determination, subject to deferential review. U.S. Br. 35-36. The district court order precludes petitioner from even seeking to invoke that statutorily-grounded BOP procedure; the district court had no authority, statutory or extrastatutory, to do so.

CONCLUSION

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

NOVEMBER 2011

PETITIONER'S BRIEF

No. 10-7387

In The
Supreme Court of the United States

MONROE ACE SETSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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Amicus's arguments rest on his primary contention that courts historically have had an inalienable authority to impose anticipatory consecutive sentencing orders. He contends that § 3584 passively recognizes some of the inherent judicial authority and creates default rules in some (but not all) cases when the court remains silent, and that the separation of powers doctrine supports his view of the statute. He is wrong on all counts.

REPLY BRIEF FOR PETITIONER

I. Amicus's claim to inherent authority for anticipatory consecutive sentencing orders fails

Amicus argues that § 3584 is not the sole source of judicial authority to order consecutive service, but he identifies no other source of authority. He argues only that the statute should be read to do less than its plain language suggests. That is, he argues that § 3584 does not grant any consecutive sentencing authority, but merely "passively recognizes" existing authority and supplies default rules for interpreting silent judgments. Br. 11.

Amicus argues that courts have "inherent authority" to issue anticipatory consecutive sentencing orders. Br. 20. But sentencing is not the exclusive province of the judicial branch, and there was no well-established doctrine permitting anticipatory consecutive sentencing orders at the time of the Sentencing Reform Act (SRA). Even assuming anticipatory orders

came within the courts' broad discretion, Congress remained free to legislate in the area, and did so.

A. There is no separation of powers problem here; sentencing authority has always been shared.

Sentencing has never been considered the sole province of the judicial branch:

> Historically, federal sentencing – the function of determining the scope and extent of punishment – never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.

Mistretta v. United States, 488 U.S. 361, 364 (1989) (internal citations omitted). Judicial sentencing discretion has always been cabined by the limits set by Congress.

Furthermore, this Court has long approved of substantial Executive involvement in determining the duration of imprisonment. *See United States v. Addonizio*, 442 U.S. 178, 190 (1979); *Williams v. New York*, 337 U.S. 241, 248 (1949). Prior to the SRA, for example, "the prisoner's actual release date generally was set by the Parole Commission." *Mistretta v. United States*, 488 U.S. at 365-66. Likewise, this Court has

held that the power to award pre-sentence credit which also determines the length of incarceration was vested in the Attorney General, not the courts. *United States v. Wilson*, 503 U.S. 329, 331-37 (1992).

Amicus notably ignores pre-SRA law empowering BOP to designate state facilities as the location for service of a federal sentence, and hence to effect a concurrent sentence. *See Gomori v. Arnold*, 533 F.2d 871, 875 (3d Cir. 1976) ("A federal court has no power to direct that a federal sentence shall run concurrently with a state sentence. . . . [A] federal judge may recommend to the Attorney General that he designate a state institution as the place of service of a federal sentence in order to make it concurrent with a state sentence being served at that institution.") (citation omitted); *see also Greathouse v. United States*, 548 F.2d 225, 227 (8th Cir. 1977); *Ange v. Paderick*, 521 F.2d 1066, 1068 (4th Cir. 1975); *United States v. Herb*, 436 F.2d 566, 568 (6th Cir. 1971); *Larios v. Madigan*, 299 F.2d 98, 100-01 (9th Cir. 1962).

Congress is presumed to be aware of prevailing law. *See Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008). In passing the SRA, Congress gave absolutely no indication that it wished to limit BOP's executive role. *See* S. REP. NO. 98-225 at 141 (1983) ("Proposed 18 U.S.C. 3621(b) follows existing law. . . . The Committee, by listing factors . . . does not intend to restrict or limit the Bureau in the exercise of its existing discretion.").

Post-SRA, there is widespread consensus that BOP is empowered to designate state facilities as the location for service of a federal sentence to provide a concurrent sentence. *See Pierce v. Holder*, 614 F.3d 158, 160 (5th Cir. 2010); *Rogers v. United States*, 180 F.3d 349, 356 (1st Cir. 1999); *United States v. Evans*, 159 F.3d 908, 911-12 (4th Cir. 1998); *McCarthy v. Doe*, 146 F.3d 118, 123 (2d Cir. 1998); *Barden v. Keohane*, 921 F.2d 476, 483 (3d Cir. 1990).

Amicus's position gives rise to a more serious separation of powers concern – the notion that "inherent" sentencing authority cannot be limited by Congress. Federal district courts "may constitutionally impose only such punishments as Congress has seen fit to authorize." *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980). The Judicial Branch does not have exclusive authority over sentencing, and Congress is empowered to fix both the "sentence for a federal crime" and "the scope of judicial discretion with response to a sentence." *Mistretta v. United States*, 488 U.S. at 364.

B. Congress properly legislated in an area of unsettled judicial authority.

Even if courts had an inherent power to issue anticipatory orders – an assumption resting on unsettled circuit case law – Congress may legislate in areas falling within the "inherent powers" of district courts. "[T]he exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese

courts were created by act of Congress.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1874)); *see also Melkonyan v. Sullivan*, 501 U.S. 89, 101 (1991).

Further, this Court has recognized that statutes may limit the courts' authority expressly or by "necessary and inescapable inference." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Accordingly, the judiciary lacks the "power to disregard the considered limitations of the law it is charged with enforcing." *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (quoting *United States v. Payner*, 447 U.S. 727, 737 (1980)). And while courts have a recognized authority to devise *procedural* – not substantive – rules, this Court has cautioned that these rules may not either "circumvent *or* conflict with" those adopted by Congressional approval. *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (emphasis added). To trigger a presumption that Congress intended to leave an inherent power in place, such a power must be of "wide use" and "long unquestioned." *Carlisle v. United States*, 517 U.S. at 426. As noted below, the few authorities marshaled by Amicus to show an inherent power of anticipatory sentencing are conflicting and equivocal.

At § 3584's enactment, courts lacked authority to impose binding concurrent sentences with respect to existing state sentences, because such orders were thought to usurp the Attorney General's power under former 18 U.S.C. § 4082. *See United States v. Thornton*, 710 F.2d 513, 516 (9th Cir. 1983); *United States v. Sackinger*, 704 F.2d 29, 30 (2d Cir. 1983); *United*

States v. Lee, 500 F.2d 586, 588 (8th Cir. 1974). Courts thus acknowledged that consecutive and concurrent sentencing authority was cabined by statute.

Moreover, courts that affirmed anticipatory consecutive orders did so on the basis of the statutory regime in place at the time – former 18 U.S.C. § 3568 – not a claimed inherent authority. *See Anderson v. United States*, 405 F.3d 492, 493 (10th Cir. 1969) (referencing § 3568); *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 75 n.2 (2d Cir. 2005) (explaining that *Salley v. United States*, 786 F.2d 546, 547-48 (2d Cir. 1986), authorized the practice "under predecessor statutes"); *see also Salley v. United States*, 786 F.2d at 548 (examining whether the anticipatory consecutive order would infringe upon Congress's delegation to the Attorney General in former 18 U.S.C. § 4082).

In any case, it was far from settled – and certainly not "long unquestioned" – that courts had authority to issue anticipatory orders before § 3584. *Carlisle v. United States*, 517 U.S. at 426. In *United States v. Eastman*, 758 F.2d 1315 (9th Cir. 1985), the Ninth Circuit reversed an anticipatory consecutive sentence *sua sponte* and on plain error review. It held that the order deprived Eastman of the

> right to have a state court consider whether a state sentence should run concurrently with his federal sentence and, further, because it creates uncertainty and ambiguity which may in the future result in problems in calculation of service of his sentence.

758 F.2d at 1318.

Salley, the only pre-SRA circuit court decision that explicitly supports Amicus's view, was sharply divided. *See Salley v. United States*, 786 F.2d 546. In it, the majority stated that "[t]he right of federal judges to impose [a consecutive] sentence has been recognized for many years."[1] *Salley v. United States*, 786 F.2d at 547. It then held that "this right may be exercised regardless of whether the state sentence has as yet been imposed." 786 F.2d at 547. It reasoned that a "federal sentence [does] not begin to run until [the defendant is] received at the correctional facility for service of that sentence" under former 18 U.S.C. § 3568. 786 F.2d at 548.

Only two judges in *Salley* agreed that this was the correct result. Judge Newman wrote separately to disagree "with the view that a sentencing judge has authority to impose a sentence to run consecutively to a sentence that has not yet been imposed." 786 F.2d at 548 (Newman, J., concurring). He opined that consecutive sentencing authority "should be used only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition." 786

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[1] Amicus suggests that the Second Circuit was speaking of long-standing authority for anticipatory orders (Br. 13), but read in context it is clear the court was referring only to consecutive orders in general. Otherwise, it would not have been necessary to add the next sentence, in which the court states that "this right" – the right to impose consecutive sentences generally – may be exercised even if the state sentence has not been imposed yet. *See Salley v. United States*, 786 F.2d at 547.

F.2d at 548. (Newman, J., concurring). Concluding as well that an anticipatory order was not sufficiently definite and certain, Judge Newman would have held that district courts "lack[ ] authority to impose a sentence consecutively to a future sentence." 786 F.2d at 549 (Newman, J., concurring).[2]

At the time of *Salley*, "[t]he only court to rule on the issue directly ha[d] held that a federal judge may not impose a sentence to run consecutively to a sentence that will be imposed in the future by a state court." 786 F.2d at 548-49 (Newman, J., concurring) (citing *United States v. Eastman*). Amicus cites three additional circuit cases that actually involve anticipatory orders,[3] but they do not squarely address the district court's statutory or inherent authority to issue them. Two of these cases passed on due process challenges to the sentences as "indefinite," not on challenges to the district court's authority. *See Anderson v. United States*, 405 F.2d at 493; *United States ex rel. Lester v. Parker*, 404 F.2d 40, 42 (3d Cir. 1968). The remaining case did not involve a challenge to the validity of an anticipatory consecutive order at all. Instead, it involved a claim that the defendant's federal sentence

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[2] Judge Newman nevertheless voted to affirm because the defendant had not raised this challenge on direct appeal. *Salley v. United States*, 786 F.2d at 549-50 (Newman, J., concurring).

[3] Other cases cited by Amicus did not involve anticipatory sentencing orders, but rather the practical reality of consecutive service when the defendant was in primary state custody. *See United States v. Kanton*, 362 F.2d 178 (7th Cir. 1966); *Hayward v. Looney*, 246 F.2d 56 (10th Cir. 1957).

should not yet have begun to run, because his state sentence was not discharged. *See Hall v. Looney*, 256 F.2d 59, 60 (10th Cir. 1958). These authorities – scarce, conflicting, equivocal, and generally spare in their reasoning – obviously do not show a "long unquestioned" practice of "wide use." It was far from clear that district courts ever had "inherent" authority to issue anticipatory consecutive orders. Accordingly, Congress's conspicuous refusal to authorize such should be read as a deliberate withholding of that power, rather than an implicit approval of such a practice.

II. Amicus's interpretation of § 3584 is unsupported by the statute's plain text.

Amicus's efforts to re-imagine the plain text of § 3584 are not plausible. The best and simplest reading of the statute's language is that it grants full consecutive sentencing authority in two out of three temporal circumstances, subject to a substantive restriction for cases involving an attempt and its object. Consecutive orders are authorized with respect to terms of imprisonment imposed before the federal sentencing, or at the same time as the federal sentencing, but not with respect to terms of imprisonment imposed after the federal sentencing. The statute then establishes default rules that operate in the two authorized circumstances.

Amicus critiques this interpretation, arguing that the first sentence cannot be a grant of sentencing

authority because it does not explicitly mention "the court." Br. 11. Yet, as in *Wilson*, the statute's verb tense helps indicate the setting and the actor. *See United States v. Wilson*, 503 U.S. at 333. Here, the statute speaks in the present tense, discussing the case where multiple terms of imprisonment "*are* imposed" at the same time; it does not use the past tense and refer to multiple terms of imprisonment that *were* imposed at the same time. Similarly, it refers to a defendant who "is" already subject to an undischarged term of imprisonment, not one who "was" already subject to such a term. *Wilson*'s guidance is clear: the use of the present tense shows that the setting envisioned is the defendant's sentencing proceeding (not the subsequent calculation of his release date) and the actor is the sentencing court (not BOP).[4]

Amicus also points out that the statute does not explicitly prohibit an anticipatory consecutive sentence. Br. 10. But it nonetheless communicates this prohibition, by authorizing concurrent or consecutive sentences in two of three temporal possibilities (*i.e.*, with respect to sentences imposed *before* or *at the same time as* the federal sentence). *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (canon of *expressio unius exclusio alterius* applies where a

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[4] This resolves as well Amicus's worry that Petitioner and the Government's reading "would leave literally *no one* to make consecutive-or-concurrent determinations in cases like Setser's." Br. 19 (emphasis added). The statute's first sentence addresses only the court.

statute identifies "a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."). Further, if the first sentence does not foreclose an anticipatory consecutive order, the two conditional phrases introducing that sentence serve no plausible function. There is no reason to specify two particular occasions in which concurrent or consecutive orders are authorized if such orders are always permissible. Moreover, there is an obvious policy rationale for the prohibition on anticipatory consecutive sentencing: a district court does not know the future term of imprisonment. The court is required to consider that (yet unknown) information in its concurrent-or-consecutive determination under § 3584(b), but cannot do so with regard to future sentences.

Amicus argues that the first sentence of § 3584(a) instead serves one of two purposes: it either "passively recognizes preexisting authority" before providing default rules in the second and third sentences (Br. 11), or it "merely delineates the realm of the default rules of the second and third sentences." Br. 19. Both suggestions are flawed.

The first view flies in the face of the canon against surplusage. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (restating the "cardinal principle of statutory

construction" that a statute ought to be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant."). Statutory terms are not presumed passive and actionless, and Amicus's interpretations render the first clauses "insignificant, if not wholly superfluous." *TRW Inc. v. Andrews*, 534 U.S. at 31 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). A statute is a command, not an observation.

Nor is it plausible to suggest that the restrictive clauses introducing the first sentence "merely delineate[ ]" the scope of the default rules. Petitioner agrees that the default rules of the second and third sentences apply only in the circumstances described by the first sentence, but this is not all that the first sentence does. It also prohibits attempt/object consecutive sentencing, and that is obviously a directive to courts, not to BOP. All of the statute's first sentence is more naturally read as a limitation on the district court's authority.

Further, under Amicus's strained reading of the first sentence of § 3584, the attempt/object limitation on consecutive sentencing applies only when the defendant is already subject to imprisonment for one of the offenses, or when the defendant is sentenced at the same time for the two offenses. Br. 22 n.7. But the Amicus's view would allow a court to order consecutive attempt/object sentences in Petitioner's situation. This reading attributes a bizarre intention to Congress and leads to absurd results, which "are to be avoided." *United States v. Wilson*, 503 U.S. at 334.

Amicus scarcely addresses the canon of *expressio unius exclusio alterius*. Amicus does not contend, nor could he, that the temporal classifications at issue here are not "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). Instead, Amicus argues that application of the canon to *a different statute* would produce absurd results. Section 3621(b) states that a court's recommendation for a defendant's placement in a community corrections facility is not binding on BOP. Amicus argues that application of the "*expressio unius*" canon to § 3621(b) would compel BOP to enforce *every other* judicial recommendation, including recommendations regarding concurrent or consecutive sentencing. His premise is questionable, as there is no "group or series" in § 3621 to invoke this canon. In any case, §§ 3621(b) and 3584(a) are plainly distinguishable. There is a finite number of temporal possibilities under § 3584: a term of imprisonment may come before the federal sentence, be imposed simultaneously with the federal sentence, or come after the federal sentence. Conversely, the number of possible judicial recommendations are infinite. Application of the canon to § 3621(b) would produce "no logical stopping point." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. at 81, 83-84. Application of the canon to § 3584, on the other hand, imposes a single, easily defined limitation – it prohibits anticipatory sentencing orders. Therefore, while Amicus's argument against

application of the canon to § 3621 may be valid, he offers no cogent argument against the canon's application to § 3584.

Next, Amicus critiques Petitioner's understanding of the statute because it does not account for a linguistic variation found in the first and third sentences of the statute. Br. 19-23. Whereas the first sentence of the statute refers to a term of imprisonment imposed while a defendant "is already subject to an undischarged term," the third sentence refers to "[m]ultiple terms of imprisonment imposed at different times."

Despite the change in language, there are several reasons to understand the default principles in the second and third sentences as limited by the situations delineated in the first sentences. The third sentence's "place in the overall statutory scheme" implies that it is dealing with the set of cases described in the first sentence, those in which the defendant enters federal court already subject to an undischarged term of imprisonment." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Any contrary reading would ignore the tight parallelism evident in § 3584(a). The first sentence specifies two circumstances in which the district court is authorized to order consecutive or concurrent service, and the second and third sentences then provide default principles operative in those two circumstances. While the use of different language in different parts of a statute ordinarily signifies a different intended meaning (*see Russello v. United States*, 464 U.S. 16, 23 (1983)), this is not necessarily so

when the language is naturally read to mean the same thing. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 45 (2008) (unnecessary to repeat explicit temporal modifier because the language actually included "is most naturally read to" include it.) Furthermore, this Court has recognized that restrictive modifiers may be implied by context without being repeated. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. at 809 (unnecessary to repeat restrictive clause "as an officer or employee" in each of its use where it was implied by context).[5] Indeed, the phrase

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[5] Amicus discusses but does not endorse the reasoning of *United States v. Romandine*, 206 F.3d 731 (7th Cir. 2000), which suggests that district courts must remain silent as to the relationship between federal sentences and future state sentences, but further suggests that the default principle in favor of consecutive sentences might nonetheless apply in that situation. *See United States v. Romandine*, 206 F.3d at 737-38. It would not be rational for Congress to mandate that *all* defendants in Petitioner's circumstance be subjected to a consecutive term, as this would produce profoundly arbitrary results, depending only on the order of sentencing. *See* Pet. Br. 29; *United States v. Wilson*, 503 U.S. at 334. Certainly, the rule of lenity counsels against such a reading in the event of ambiguity. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971). Petitioner's view of the third sentence permits the court to impose a concurrent sentence in every case where the default rule to consecutive sentencing would be applicable, and honors the place of the third sentence in the overall statutory scheme.

In any case, as Amicus notes, even the *Romandine* court did not withhold from BOP the power to run such sentences concurrently. Br. 21 n.6; *United States v. Romandine*, 206 F.3d at 738-39. As noted above, courts have long been in consensus that the Executive has the authority to effectuate a concurrent sentence by way of a facility designation.

"[m]ultiple terms of imprisonment imposed at different times" as it appears in the third sentence cannot plausibly be read to mean "*all* terms of imprisonment imposed at different times," or the result would be to negate the prohibition on consecutive attempt/object sentencing. The third sentence does not apply to Petitioner's situation, because he was not already subject to an undischarged term of imprisonment.

Amicus suggests that the third sentence might authorize anticipatory concurrent sentences, and argues this possibility defeats the idea that the first sentence sets limits on the courts' authority. Br. 22. This argument suffers many of the same flaws outlined above. It provides no function for the restrictive clauses that introduce the first sentence, thereby violating the rule against surplusage. It supposes a contorted way for Congress to express that district courts have anticipatory sentencing authority, buried by implication in the statute's third sentence. And as Amicus appears to agree, the more natural reading of the third sentence is as a default principle, not as an independent grant of authority.

Amicus also attacks the idea that BOP might make the concurrent/consecutive determination in cases involving a later-imposed state sentence. Again, however, his concessions are telling. Amicus concedes that BOP may impose a concurrent sentence by retroactively designating a state facility in several circumstances: when implementing a concurrent order, when a district court imposes conflicting anticipatory orders

(Br. 35), and, presumably, when the district court remains silent as to a future term. That is, Amicus concedes that some cases "necessarily require[ ] BOP to administratively determine whether federal credit is justifiable for time served on a state sentence." Br. 50. But Congress's decision to withhold consecutive sentencing authority as to future state sentences requires this administrative determination whenever a state sentence follows a federal one.

Similarly, Amicus overstates the textual case against BOP's authority to award credit for time in state custody. Several factors enumerated in § 3621(b) replicate the § 3553(a) factors, and are accordingly well-suited to the concurrent/consecutive decision. These include "the nature and circumstances of the offense," "the history and characteristics of the prisoner," statements by the court "concerning the purposes for which the sentence to imprisonment was determined to be warranted," and, most pertinently, the Sentencing Commission's policy statements. 18 U.S.C. § 3621(b). Further, as noted above, there has been longstanding consensus that BOP is empowered to designate state facilities as the location for service of a federal sentence, thus providing a concurrent sentence. *See supra,* pp. 3-4.

III. Even if Amicus's construction of § 3584 were plausible, Petitioner's construction is preferable.

Amicus's construction permits the final, binding decision about concurrent or consecutive service to be made by the actor who possesses the least information. A district court making an anticipatory order does not know whether the future sentence will occur; what its length will be; whether it will run concurrently with or consecutively to any other sentence; whether the sentence will be premised on or enhanced by the conduct underlying the federal case; what facts will be elucidated in that litigation; or what the second court will say about the concurrent/consecutive decision. All of these factors are, at the very least, *relevant* to the decision.

Amicus protests that "[d]istrict courts can readily apply the § 3553(a) factors in many anticipatory contexts." Br. 34. At best, district courts may form a preference based upon limited knowledge. To the extent those preferences, based on incomplete information, are worthy of respect, Petitioner's construction permits the court to express them in a recommendation under § 3621(b)(4). But under Amicus's construction, those premature determinations acquire the controlling force of law.

Moreover, because Amicus relies so heavily upon extra-statutory inherent authority, he can point to no definitive source to resolve difficult questions about its scope. He instead must rely on mere judicial

intuition. The weakness of this position is demonstrated by Amicus's own argument. Under Petitioner's view, consecutive orders anticipating a *federal* sentence are precluded because the text of § 3584 does not authorize *any* anticipatory consecutive orders at all. But there is no text delineating the scope of "inherent authority," and accordingly, no guarantee that it will not also authorize courts to anticipate future *federal* sentences. Amicus can say only that those orders carry "different consequences for all parties," that they "might . . . be categorically 'unreasonable' under § 3553(a)," and that appellate courts very well may use "their supervisory authority" to prohibit them. Br. 41-42. Certainly, § 3584 does not distinguish between state and federal sentences.

The same problem arises as to "*unknown* future cases." Br. 33. Amicus agrees that a district court should not order consecutive service as to unknown offenses, but he cannot explain why doing so would be unauthorized. If district courts possess broad inherent authority to order consecutive service as to anticipated sentences, then there really is no source to warn the court that the state charge must be ***known***. Nor can the court discern what stage of the state prosecution permits an anticipatory determination: an adjudication of guilt, a formal charge by indictment or information, an arrest, a complaint, a search warrant, or an accusation of misbehavior in the presentence report. Petitioner's rule is easier to administer: if the defendant is already serving another sentence, or if another sentence is imposed at the same time, the

judge may order consecutive or concurrent service. Otherwise, she cannot.

Contending that its position better honors the spirit of federalism, Amicus argues that anticipatory sentencing allows state courts to choose the ultimate length of imprisonment, which they may not be able to do if they do not know how BOP will treat the defendant. Br. 39-40. But this ignores a risk that state judges confronted with a federal judgment demanding consecutive service will feel coerced to also impose a consecutive sentence. This possibility is reason enough to avoid Amicus's position. Further, Amicus wrongly focuses on the influence of state courts on the total quantum of imprisonment, rather than the independence of those courts. The independence of state courts is not threatened by their inability to determine the total length of imprisonment, but by their inability to determine the effect of their own judgments, and to "administ[er] . . . a discrete criminal justice system." *Oregon v. Ice*, 555 U.S. 160, 168; *see also Nixon v. Missouri Mun. League*, 541 U.S. 125, 140-41 (2004) (Congress is presumed not to "trench on the States' arrangements for conducting their own governments"). Anticipatory consecutive orders unilaterally seize the right to determine the relationship between federal and state sentences, and require BOP to ignore a contrary state judgment.

Under Petitioner's view, by contrast, the state court may address the consecutive versus concurrent question explicitly, without the need to manipulate

the sentence length (which course of action in any event may be foreclosed by mandatory minimums). Moreover, the ultimate federal decision-maker (BOP) will have the benefit of the state court's views on the concurrence question and the ability to practice comity. *See United States v. Warren*, 610 F.2d 680, 685 (9th Cir. 1980) ("In the federal system, the 'power and discretion' to practice comity is vested in the Attorney General.") (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922)). Petitioner's view better promotes comity.

IV. The district court unreasonably ordered Petitioner's federal sentence to run both concurrently to, and consecutively with, the same state term of imprisonment.

Even under Amicus's understanding of reasonableness review,[6] this sentence must be vacated. In his discussion of consecutive orders anticipating another *federal* sentence, Amicus concedes that BOP cannot be expected to execute inconsistent orders. Br. 42.

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[6] Amicus argues that appellate reasonableness review will "resolve[ ] any practical problems" with anticipatory consecutive orders (Br. 31), but in many cases the circuit court will be in no better position than the district court. In this case, Petitioner was sentenced by the state court while his direct appeal was pending, so the appellate court knew that the possibility of inconsistency created by the district court's order had become actual inconsistency. But in many cases, the state charges are unresolved even at the time of direct appeal. Those defendants cannot rely upon reasonableness review because the facts will remain unknown to the appellate court as well.

He further admits that the possibility of subsequent contradiction "might, for that reason alone" render a consecutive order as to an anticipated federal sentence "categorically 'unreasonable' under § 3553(a)." Br. 42. But in this very case, the district court entered two inconsistent orders which must be executed by "the *same* jailer (BOP)." Br. 42. The judgment commands BOP to run the federal sentence both consecutive and concurrent to the merged state term. This is impossible.

Amicus argues that the inconsistent orders are workable, but this argument mischaracterizes both the orders and Petitioner's state prison service. First, he argues that the district court imposed a "partially concurrent federal sentence." Br. 34. This is not so. It ordered the federal sentence to run fully concurrent with the 2007 state case, and fully consecutive to the 2006 state case. Nothing was partial. J.A. 15-16. There is no "ambiguity," "latent" or otherwise. Br. 35. The judgment unambiguously orders full concurrent service with the sentence in the 2007 state drug case, and unambiguously orders full consecutive service with respect to the sentence in the 2006 state drug case.

Likewise, Amicus suggests that the district court intended Petitioner to serve five years of state custody consecutively, and anything over that concurrently. Br. 35. But this is no more accurate than to say that the court intended Petitioner to serve ten years concurrently, and anything after that consecutively.

Nothing in the federal judgment gives priority to the consecutive order over the concurrent. In any event, at the time it acted, the court did not know what new sentence Petitioner would receive in the revocation case, or indeed whether his probation would ultimately be revoked. This well-illustrates why it is unreasonable for a district court to issue binding orders regarding the order of service before it has all the facts.[7]

Second, Amicus argues that his personal calculations show the change in Petitioner's parole eligibility date attributable to his second state sentence. Br. 37 & nn.12-13. He suggests this provides an easily workable number that BOP can use to award credit to Petitioner under the concurrent sentencing order. But BOP has already made an initial determination. J.A. 62 ("BOP has determined that Setser is not entitled

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[7] Because the state sentence had not yet been imposed, USSG § 5G1.3 simply did not apply. *Cf.* Br. 35; U.S. Br. 17 n.5. If the state sentences had been imposed *before* the federal sentence, USSG § 5G1.3 would recommend credit "for any period of imprisonment already served on the undischarged term of imprisonment" for the 2007 state drug case, and then concurrent service with respect to the remaining portion of the sentence in that case. USSG § 5G1.3(b). Because the two state sentences would "seemingly call for the application of different rules," the court would be required to adjust its sentence and order partial concurrency to achieve a reasonable aggregate punishment. USSG § 5G1.3(c) & cmt., n.3(D). But USSG § 5G1.3 did not apply, because the Sentencing Commission reads the statute in the same way that Petitioner and the government do: the district court lacks the authority to impose anticipatory consecutive terms. Pet. Br. 24-26; U.S. Br. 24-25.

to any credit for the time he spent in state custody."). And regardless of when Petitioner *might have been* eligible for parole, he was not paroled then. He was *in fact* paroled on the same date in both cases. Thus, hypothetical eligibility aside, every day Petitioner served in state custody was served on the 2006 state revocation case, and he is not entitled to credit for it under the district court's consecutive order. The problem, of course, is that every day Petitioner served in state custody was also served on the 2007 state case, and he *is* entitled to credit for it (and all of it, not just some of it) under the district court's *concurrent* order. There was no state custody time "attributable solely to the ten-year sentence for the 2007 drug-possession offense." Br. 36. The orders are irreconcilable.

The district court in this case occupied the same position as the first district court in the anticipatory-federal situation, where Amicus acknowledges that the result would be unreasonable. The court did not know what the subsequent decision-maker would do – because even assuming that the Texas court chose to revoke Petitioner's probation, it could have imposed any term of imprisonment up to five years. *See* TEX. CODE CRIM. PROC. art. 42.12, § 23(a). But the district court nonetheless sought to dictate how its sentence would interact with two unknown sentences. In doing so, the court created the possibility (and eventual reality) of subsequent "inconsistency." Thus, even Amicus's reasoning demonstrates that the sentence

should be reversed as unreasonable or vacated through "supervisory authority." Br. 42-43.

CONCLUSION

For the foregoing reasons and those in Petitioner's opening brief, the consecutive sentencing term should be stricken from the district court's judgment. Alternatively, the judgment of the court of appeals should be reversed and the case remanded.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. A federal sentence may be imposed before, but served after, an impending state sentence. The federal sentence is necessarily either concurrent with the state sentence (if the federal sentence credits some state-prison time) or consecutive to the state sentence (if no such credit is given). May the concurrent-or-consecutive sentencing determination be made by the federal court at the time of sentencing, or did Congress transfer that sentencing authority exclusively to the Executive Branch, and specifically to the Federal Bureau of Prisons?

2. The district court, when sentencing petitioner Setser, knew that state proceedings against him were already underway. Setser had been indicted for a Texas state offense based upon the same conduct that led to the federal conviction, and the State of Texas had applied to revoke Setser's probation as to a prior conviction. The district court therefore sentenced Setser to serve the federal sentence concurrently with the state sentence for the offense which offended both sovereigns. It also ordered that Setser's federal sentence run consecutively to any state sentence for the revocation of his state probation. Was the first-imposed federal sentence unreasonable because the state court thereafter ordered the state terms to run concurrently with each other?

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IN THE

Supreme Court of the United States

NO. 10-7387

MONROE ACE SETSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

INTEREST OF *AMICUS CURIAE*

This brief is submitted by Evan A. Young, *amicus curiae* in support of the judgment below, by invitation of the Court. See 564 U.S. ___ (order of June 15, 2011).[1]

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[1] *Amicus* affirms, under this Court's Rule 37.6, that no counsel for a party authored any part of this brief, and no person other than *amicus* and his co-counsel have made a monetary contribution to fund its preparation or submission.

STATUTORY PROVISION INVOLVED

The principal statute involved is 18 U.S.C. §3584,[2] which provides:

Multiple sentences of imprisonment

(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

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[2] All statutory references are to Title 18 of the United States Code unless otherwise indicated.

STATEMENT

The decision in this case will allocate authority—either to judges or jailers—to determine whether a federal sentence will be served concurrently with or consecutively to an impending, but as-yet-unimposed, state sentence. The allocation will govern cases when a defendant is sentenced in federal court *first*, but incarcerated in federal prison *last*, with state sentencing and imprisonment fitting between these "federal bookends." The decision generally will affect sentencing authority only in cases that, like Setser's, proceed along six specific stages:

(1) the defendant begins in state custody;

(2) he is subsequently "borrowed" by federal authorities pursuant to a writ of habeas corpus ad prosequendum;

(3) he is convicted and sentenced in federal court;

(4) he is returned to state custody, and is eventually sentenced in the state court;

(5) he serves his state term of imprisonment; and finally

(6) he is transferred to federal custody for federal imprisonment.

Under such circumstances, the defendant's federal sentence cannot avoid being consecutive to or concurrent with state imprisonment. The only questions are *who* will decide, and *when*. The judgment below permits the district judge, subject to appellate review for reasonableness, to make that sentencing determination at stage 3. J.A. 56-57. Setser and the Government argue that Congress transferred that authority to the jailer—the Federal Bureau of Prisons—to make that determination at stage 5 or 6.[3]

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[3] Only those cases following this sequence are implicated because a court's sentence governs jailers of that court's sovereign. Thus, if

I. SETSER'S SENTENCES

Central to this case is Setser's commission, while on probation for a prior state conviction, of a new crime that offended both sovereigns. J.A. 55. Proceedings against Setser in the state court were ongoing when federal authorities "borrowed" him pursuant to a writ of habeas corpus ad prosequendum. J.A. 70. He pleaded guilty to federal charges and was sentenced to 151 months' imprisonment. J.A. 14-16. Because he remained in primary state custody, he was not incarcerated by BOP, but was returned to the State, with the federal sentence to be served following any state sentences. See J.A. 55-56.

The federal court, citing the state-court cases by docket number, ordered that the federal sentence "be served concurrent with" any state-prison sentence for the drug offense against both sovereigns. It also ordered that Setser receive no such credit for the prior, unrelated offense, ordering that the federal sentence "be served consecutive with" any state sentence in that case. J.A. 16, 25.

Back in Texas court, Setser's probation was revoked. J.A. 38. He had originally been sentenced to a five-year prison term for the underlying offense; that term had not been discharged, but probated, J.A. 35-36, and the court ordered him to serve it. J.A. 38. Setser received a ten-year sentence for the drug offense that was also the basis for the federal prosecution. J.A. 29-30. The court ordered both state sentences to run concurrently. J.A. 30, 36. Setser was imprisoned and paroled after two and a

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federal sentencing *and* federal imprisonment precede state imprisonment, a federal concurrent-or-consecutive order has no effect—the state prisons will credit (or not) federal time based on state-court orders. Nor are multiple federal sentences implicated here. See Part II.C.2, *infra*.

half years—before the maximum time for *either* state sentence had run. J.A. 56.

II. THE JUDGMENT BELOW

The Fifth Circuit affirmed. J.A. 54-64. Circuit precedent authorized anticipatory sentencing, whereby a district court may order the federal sentence to run concurrently with or consecutive to an impending state sentence, subject to appellate review for reasonableness. The court found Setser's sentence to be reasonable and unambiguous. J.A. 56-64. "Any ambiguity in the district court's sentence was not introduced until after the state court ordered Setser's two state sentences to run concurrently." J.A. 61. Setser's claim merely demonstrated "the very practical problems that arise in carrying out overlapping state and federal sentences in a dual sovereignty." *Ibid.* (internal citation omitted). Finally, given that the sentence was legal, Setser's avenue for enforcing any claimed right was to pursue administrative relief with BOP and then, if necessary, judicial review. J.A. 62.

Despite the district court's order that he receive credit for time served in state prison attributable to the common act that was punished by both sovereigns, Setser has not sought such credit, J.A. 63; U.S. Br. 36 n.21, and BOP has given him none. J.A. 56, 62-63.

SUMMARY OF ARGUMENT

Determining the length of a criminal sentence is the province of the judge, not the jailer. Setser and the Government would invert that structure. Their reasons for transferring judicial authority to the Executive are textually and historically unsupported, and their proposed interpretation poses grave practical and constitutional concerns. This Court therefore should affirm the judgment below.

The court of appeals properly upheld the district judge's discretion—subject to appellate review for rea-

sonableness—to make a federal sentence run concurrently or consecutively to an impending, but as-yet-unimposed, state sentence. The opposite outcome—federal-court silence—leaves the defendant in suspense and the state court in ignorance until BOP decides whether the state sentence counts toward the federal sentence.

Federal-court silence is never desirable. If mandated, it would deprive defendants of the ability to make their case before judges, with the benefit of counsel, in open court, and with direct appellate review. When judges meaningfully can apply the sentencing factors of § 3553(a) to determine the concurrent-or-consecutive question, doing so is salutary. When they cannot, doing so is by definition unreasonable, and therefore reversible. No legal or practical reason justifies silencing judges in *all* anticipatory cases simply because in *some* they cannot meaningfully resolve the issue.

I. The proposed surrender of power to the Executive is not compelled by § 3584(a) or any other statute, and is unlikely to have been Congress's intent. Under the common law, judges have had longstanding sentencing authority, and Congress did not withdraw it. Section 3584(a) provides default rules for some, but not all, consecutive-or-concurrent decisions. It is not the exclusive grant of such sentencing authority, nor does it require judicial silence in situations beyond its scope. When federal incarceration must follow a state term, but the federal sentence is imposed first, a judicial concurrent-or-consecutive determination is all the more important precisely because no § 3584(a) default rule is available.

The legislative history, moreover, demonstrates a congressional desire for judicial *guidance*, not silence, in sentencing. Indeed, the legislative history reveals considerable congressional hostility to previous executive encroachments on judicial authority.

II. Common sense, policy, practice, and federalism also point to leaving judicial discretion with judges. Setser and the Government hypothesize various outlandish anticipatory sentences that (if some court ever were to impose them) would be an abuse of discretion regardless of the proper interpretation of §3584(a). But occasional judicial excess, as in *any* sentencing context, is solved through appeals, not the wholesale abnegation of judicial power. And many anticipatory sentences—Setser's own among them—are plainly reasonable. By making Setser's federal sentence concurrent with the state sentence for the common offense, but consecutive to the sentence for the prior state offense, the district court made clear what credit was, and was not, due to Setser. If Setser can show what state-prison time was attributable to the prior offense, he is entitled to the balance as a credit against his federal sentence.

Federalism and comity are impeded, not advanced, by silencing federal judges as to the concurrent-or-consecutive effect of a federal sentence. An anterior federal sentence tells the state court how long the defendant will spend in federal prison after finishing a state term. With that knowledge, the state court, if it so desires, may adjust its sentence to account for the impending federal sentence. Because state courts cannot dictate the effect of a federal sentence, leaving the consecutive-or-concurrent decision to the second-sentencing state judge is not a valid option when the state sentence is served first. The Sphinx-like silence demanded by Setser and the Government would leave state courts with no idea what course BOP might later take, risking the imposition of unduly long or short state terms.

III. Moreover, their interpretation is burdened by substantial separation-of-powers implications. The rule of silence they advocate would arrogate Article III power to the Executive. Sentencing is for the court, and the de-

termination of whether a sentence should be concurrent or consecutive is a historical aspect of sentencing power. BOP, by contrast, is an agency; its administrative authority to determine *where* a sentence is served does not entail power to determine that sentence's *length*.

All separation-of-powers violations threaten liberty, but limiting the due-process protections afforded by Article III judges is particularly dangerous. Citizens expect their "day in court," not their day of administrative hearing—particularly one that, as BOP's procedures acknowledge, presumes consecutive terms. BOP's claim that it welcomes judges' "advice" or "views" on the concurrent-or-consecutive question—inviting advisory opinions rather than binding sentences—exacerbates, rather than mitigates, the constitutional concern. Whether Congress *could* transfer such sentencing authority to the Executive is questionable. But this Court should not attribute any such intent to Congress when §3584(a) does not require it.

ARGUMENT

If a prisoner is subject to multiple terms of imprisonment, judicial silence as to whether those terms are consecutive or concurrent prevents certainty for prisoners, other courts, and the correctional agencies into whose custody the prisoner is placed. When reforming federal sentencing in 1984, therefore, Congress for the first time codified default rules for classifying sentences as consecutive or concurrent when judges are silent. See §3584(a). But it did not attempt to supply default rules for every eventuality. Whether a federal sentence should run concurrently or consecutively to a sentence that has not yet been imposed by another sovereign's court, for instance, involves so many variables that no single default rule would be appropriate.

Instead, Congress accounted for such cases in §3584(b), which requires judges who impose consecutive or concurrent sentences in *any* case to do so pursuant to the familiar sentencing factors of §3553(a). Thus, the federal judge's discretionary sentence will be subject to meaningful appellate review for reasonableness.

Setser and the Government would turn that sensible approach on its head. Reading §3584(a) as a "grant"—indeed, the *exclusive* source—of concurrent-or-consecutive sentencing authority, they conclude that Congress intended to silence courts in the very cases in which sound judicial discretion is *most* important: those in which no default rule is available. Instead, they say, Congress must have intended to transfer sentencing authority from the courts to BOP. Once the prisoner is returned to federal custody, BOP will undertake the quintessentially judicial task of deciding how long the sentence must be.

This is error. Section 3584(a), far from being an exclusive grant of authority, is but a substitute for judicial silence in specified contexts. The legislative history confirms as much, revealing both a desire for judicial guidance and a deep hostility to executive determinations of sentence length. Similarly, citing federalism, Setser and the Government assert that state judges can sentence effectively only if federal judges are silent—plainly wrong, since absent a judicial concurrent-or-consecutive ruling, the state judge sentences in the dark with respect to the federal sentence's length. State judges cannot determine how long a federal prisoner remains in federal prison, but by knowing how long that federal term will actually be, state judges can meaningfully affect the total punishment.

Finally, transferring sentencing authority to the Executive as proposed by Setser and the Government threatens the separation of powers. Depriving the de-

fendant of the manifold protections of open courts and direct appeals—and relegating him to administrative hearings before the same Executive that prosecuted him—threatens to encroach on individual liberty. If Congress truly intends to withdraw discretion from the courts, it can say so. It has not said so yet.

I. FEDERAL LAW CONTEMPLATES JUDICIAL, NOT EXECUTIVE, AUTHORITY TO SENTENCE CONCURRENTLY OR CONSECUTIVELY

No statute mandates the elimination of judicial power that Setser and the Government propose. Congress left consecutive-or-concurrent sentencing authority where Congress found it—with the courts. Section 3584(a) merely supplies default rules for some cases when courts *choose not* to exercise that authority. Section 3584(b), by contrast, applies when courts expressly use their power to decide between consecutive or concurrent sentences, directing them to do so pursuant to § 3553(a)'s sentencing factors. Far from intending to silence the courts and transfer their power to the Executive, Congress wanted *more* judicial guidance as to concurrent-or-consecutive decisions.

A. Section 3584 does not withdraw judicial sentencing discretion in cases like Setser's

Setser and the Government insist that the "plain text" muzzles federal judges in cases like Setser's. Not only does the statute lack any words precluding this power, but the interpretation utterly ignores the historical sentencing authority of judges at the time Congress legislated. And it overlooks statutory text and structure that confirm broad judicial authority to make concurrent-or-consecutive determinations in circumstances like those present here.

1. *The statutory text does not "grant" authority, but channels discretion*

This case turns initially on how Congress allocated sentencing authority between the Judiciary and the Executive in various provisions of the Sentencing Reform Act, including §3584. Setser and the Government must convince the Court that Congress "granted" district courts authority to sentence consecutively or concurrently only in the two circumstances described in the first sentence of §3584(a)—simultaneously imposed sentences, or a sentence imposed when a prisoner is already subject to a prior term of imprisonment.

But the statute does not *read* like a grant of power to courts at all. It is phrased in the passive voice—indeed, the word "court" does not even appear in the putative power-granting first sentence. Congress routinely grants authority by identifying the recipients of that authority, then delineating their power. That is the common practice even looking just at Title 18—including in situations that, unlike diminutions of judicial authority, may not *require* such clarity. See, *e.g.*, §3555 ("court * * * may order" defendant convicted of fraud to give explanation to victims); §3573 ("court may" remit or defer payment of fine); §3582(c)(1)(A) ("court * * * may" modify imposed term of imprisonment); §3582(d) ("court * * * may include as part of the sentence an order that requires the defendant not associate or communicate with a specified person"); §3663(a)(1)(A) ("court * * * may order" certain defendants to make restitution). Not so here: "If multiple terms are imposed on a defendant * * *, the terms may run concurrently or consecutively." §3584(a).

Beyond the first sentence, which passively recognizes preexisting authority, the remaining two sentences simply create default rules to provide clarity when no court has actively exercised its discretion to choose a result.

The statute thus looks exactly like the Senate Report described it: "a *rule of construction* in the cases in which the court is silent as to whether sentences are consecutive or concurrent," enacted "to avoid litigation" over the question in the face of silence. S. Rep. No. 225, 98th Cong., 1st Sess. 127 (1983) (emphasis added) ("Report").

Setser and the Government say comparatively little about §3584(b), but it is crucial to understanding how the statute functions as a whole. Section 3584(b) guides discretion when judges *speak* on the concurrent-or-consecutive question. It orders courts in all such cases (including Setser's) to use the §3553(a) sentencing factors. In that way, §3584(b) complements §3584(a) by protecting against erroneous imposition of concurrent-or-consecutive sentences, whether resulting from a default rule or from an affirmative judicial choice.

2. *Section 3584 fits within the historical context of broad judicial discretion*

Although this Court reads statutes in light of the legal history prevailing at their inception, see, *e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001), Setser and the Government proceed as if judicial sentencing were born in 1984. They imbue §3584(a) with an assumption lacking a textual or historical basis—that it is *the source* of consecutive-or-concurrent sentencing authority. Congress certainly did not say this, nor does anything in the circumstances surrounding the statute's adoption suggest it.

a. "'Firmly rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges.'" *Oregon* v. *Ice*, 555 U.S. 160, 168-69 (2009) (quoting A. Campbell, Law of Sentencing §9:22, p. 425 (3d ed. 2004)). The Court in *Ice* recognized as "unfettered" the "discretion judges possessed at common law to impose consecu-

tive sentences at will," *id.* at 163, 171. Our Anglo-American legal heritage, dating from colonial times, presupposes "'[i]nherent jurisdiction to impose consecutive sentences of imprisonment in any appropriate case where the court had power to imprison.'" *Id.* at 169 n.8 (quoting *Lee* v. *Walker*, [1985] 1 Q.B. 1191, 1201 (C.A. 1984)). This was still the regime in federal court at the time Congress passed the Sentencing Reform Act. See, *e.g.*, *Tapia* v. *United States*, 131 S. Ct. 2382, 2386 (2011); *Dorszynski* v. *United States*, 418 U.S. 424, 443 (1974). Indeed, at that time, "[e]xisting law permit[ted] the imposition of either concurrent or consecutive sentences, but provide[d] the courts with *no statutory guidance* in making the choice." Report at 126 (emphasis added).

b. Federal courts' broad authority extended to cases like Setser's. A sentence ordered "to run consecutively to whatever sentence [defendant] received in connection with his pending New York robbery charge" gave the Second Circuit no pause; it stated that "[t]he right of federal judges to impose such a sentence has been recognized for many years." *Salley* v. *United States*, 786 F.2d 546, 547 (2d Cir. 1986).[4] See also, *e.g.*, *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 n.2 (2d Cir. 2005) (noting circuit precedent approving pre-§3584 anticipatory sentencing); *Anderson* v. *United States*, 405 F.2d 492, 493 (10th Cir. 1969) (*per curiam*) (endorsing anticipatory sentencing); *United States ex rel. Lester* v. *Parker*, 404 F.2d 40, 41-42 (3d Cir. 1968) (approving anticipatory federal sentence); *Hall* v. *Looney*, 256 F.2d 59, 59-60 (10th Cir. 1958) (*per curiam*) (finding no defect in anticipatory

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[4] The court knew of one appellate decision to the contrary—*United States* v. *Eastman*, 758 F.2d 1315 (9th Cir. 1985). The Second Circuit, with one judge dissenting, stated that if *Eastman* "enunciates a different rule, it is dictum with which we disagree." *Salley*, 786 F.2d at 548; see *id.* at 548-549 (Newman, J., dissenting).

consecutive sentence); *Smith* v. *Keohane*, 491 F. Supp. 626, 628 (W.D. Okla. 1979) (describing anticipatory sentence imposed when "at the time of federal sentencing, no state sentence had been imposed"); *United States* v. *Barnett*, 258 F. Supp. 455, 456 (M.D. Tenn. 1965) (federal sentence would run "concurrent with any additional sentence [defendant] might receive" after federal sentencing). And while it was apparently much rarer for state courts to be in the position that the federal court occupied in Setser's case, anticipatory sentencing in the dual-sovereign context was, and is, not uniquely a federal-court practice. See, *e.g.*, *State* v. *Mees*, 272 N.W.2d 61, 62, 67-68 (N.D. 1978) (holding that "a North Dakota sentence of imprisonment may be imposed upon a defendant to commence on the date of his release from federal custody when at the time of state sentencing the defendant was awaiting sentencing by a federal court"); *Thomas* v. *Drew*, No. 5:10-cv-00180, 2011 WL 867487, at *1, *9 (S.D. W. Va. Mar. 14, 2011) (describing Virginia state-court sentence imposed consecutively to anticipated federal sentence).

In other cases, courts implicitly recognized anticipatory-sentencing power. See, *e.g.*, *United States* v. *Kanton*, 362 F.2d 178, 179-180 (7th Cir. 1966) ("[a]bsent clear intent to have defendant's sentence run concurrently with any [impending] state sentence," defendant lacked any right to concurrent treatment); *Hayward* v. *Looney*, 246 F.2d 56, 57 (10th Cir. 1957) (in similar circumstances, "[t]he judgment of the Federal court contained no reference to any state sentence and no recital as to the time of commencement of the Federal sentence"); *Reed* v. *United States*, 236 F. Supp. 967, 967 (S.D. Tex. 1964) ("[s]ince this Court had not provided that the federal sentence be concurrent with any State sentence which might be imposed," motion to achieve concurrent effect was

overruled). Unexercised power is not noteworthy if such power did not actually exist.

c. Challenges to anticipatory sentences generally concerned not *authority*, but *clarity*. See, *e.g.*, *Anderson*, 405 F.2d at 493; *Parker*, 404 F.2d at 42. "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *United States* v. *Daugherty*, 269 U.S. 360, 363 (1926). Setser quotes that sentence twice, Pet. Br. 12, 40, but not the one that follows it: "The elimination of every possible doubt cannot be demanded." *Daugherty*, *supra*, at 363. Indeed, only *more* judicial guidance, not less, could eliminate "misapprehensions by those who must execute" sentences, *ibid.*—i.e., BOP. Judges crossed the line not by sentencing anticipatorily, but by sentencing unclearly.

3. *Congress would not make such a substantial change absent a clear expression*

The historical background is dispositive because this Court requires clear statements before it will infer congressional intent to diminish judicial power. Congressional transfer of the ultimate sentencing decision from the courts to BOP is too momentous a shift to be implied from a text that does not mandate it.

Confronting another argument for a statutory reading that would "limi[t] the sentencing court's discretion," this Court held that it "will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it." *Dorszynski*, 418 U.S. at 441. Accord *INS* v. *St. Cyr*, 533 U.S. 289, 298-299 & n.10 (2001); *Williams* v. *Taylor*, 529 U.S. 362, 379 (2000) ("[i]f Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity").

Even in matters less constitutionally significant than the deprivation of liberty, the Court expects clear statements if longstanding practices are changed. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944) ("if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain"). That is a sensible rule of construction, for "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

Accordingly, in *United States* v. *Wilson*, 503 U.S. 329 (1992), the lack of a clear statement, despite the presence of a plausible one, was fatal to a statutory interpretation that would allow district judges to intrude on BOP's ministerial authority to calculate pre-sentence detention credit under §3585(b). "'It is not lightly to be assumed that Congress intended to depart from a long established policy.'" *Id.* at 336 (quoting *Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619, 627 (1925)). If in *Wilson* the Court vindicated *BOP* authority against a claim of *judicial* power, it should certainly vindicate the traditional authority of judges against BOP's claim here.

Congress knows that, unlike BOP, "courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority," *Ex parte United States*, 242 U.S. 27, 41-42 (1916), and hold broad "discretion * * * at common law to impose consecutive sentences at will," *Ice*, 555 U.S. at 171. It knows that no "grant" is needed for any such authority; sentencing discretion is so firmly entrenched as to be called "inherent in the courts." *Swempston* v. *United States*, 289 F.2d 166, 168 (8th Cir. 1961); *Sherman* v. *United States*, 241 F.2d 329, 336-337 (9th Cir. 1957).

Consistent with these principles, Congress acted clearly in establishing binding Sentencing Guidelines. See *United States* v. *Booker*, 543 U.S. 220, 233-234 (2005). But the mousehole of §3584(a)'s first sentence—passively phrased, omitting reference to courts (much less BOP), and lacking the language of a limited grant of power—conceals no elephantine shift of core sentencing authority from courts to BOP.

4. *Section 3584 functions as a whole*

The interaction of text and history makes it easier to see how the statute functions as a whole. For example, the preclusion of consecutive sentences for "an attempt and another offense that was the sole objective of the attempt" is readily explained by §3584(a)'s role as a discretion-channeling provision applicable when judges are silent. Because that default rule could have the unintentionally harsh consequence of *requiring* attempt-object consecutive sentences as a matter of law, Congress excised that narrow possibility.

But Congress did not need to statutorily preclude attempt-object consecutive sentences in cases like Setser's, which are not governed by any default rule. The lack of a default rule is sensible; given the potential disparity in knowledge about various impending cases, a single default rule could potentially cause more harm than good. Instead, in cases like Setser's, judges may exercise their preexisting authority to make concurrent-or-consecutive decisions under §3584(b). This in turn requires recourse to the §3553(a) factors, which inform *all* sentences and subsequent appellate review for reasonableness. *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007).

What eliminates the risk of erroneously imposed anticipatory attempt-object consecutive sentences is, first, that any anticipatory sentence must be *affirmatively* undertaken by the judge, not automatically imposed by de-

fault. Second, the guarantee of sentencing pursuant to §3553(a) means that, were a judge to unreasonably impose such a sentence, the defendant could appeal based upon the sentencing factors. Congress acted sensibly by providing an attempt-object exclusion where default rules threaten harsh results.

Of course, precisely because there *is* no default rule available in cases like Setser's, judicial guidance is especially valuable. The proposed rule of silence would make this impossible. It would deprive prisoners of the chance to make their case for concurrent sentences before a judge, consigning them instead to a BOP regime stacked in favor of consecutive sentences.

B. Setser and the Government cannot sustain their "plain-text" argument

The lack of a plain statement withdrawing the Judiciary's historical sentencing authority should resolve this case. But there are still more reasons why Setser and the Government cannot make a persuasive plain-text argument.

1. *Stripped of assumptions, the plain text delineates default rules, and goes no further*

The "grant" theory falters at the start. As described above, see Part I.A.1, *supra*, all the textual clues militate against reading the first, passive sentence of §3584(a) as a "grant" of authority. For a putative grant of such significance as *all federal judicial authority to sentence concurrently or consecutively*, one might at least expect to find the word "court" in the relevant text.

The words of the first sentence instead simply stipulate that the two specified circumstances may result in either concurrent or consecutive terms. Nor does it state that the two specified circumstances are the *only* circumstances when consecutive or concurrent terms are legally permitted. Nothing in the text justifies smuggling in ex-

tra-textual and ahistorical assumptions about the allocation of power or permissible sentencing practice in other circumstances. Stripped of those assumptions, the first sentence merely delineates the realm of the default rules of the second and third sentences, and qualifies that scope by removing the possibility of consecutive sentences for "an attempt" and its "sole objective." §3584(a). Of all proposed readings of the first sentence, this is the plainest.

Setser and the Government, however, argue that §3584(a) *limits* courts' power to the two circumstances specified in the first sentence. That assertion is not only textually unsupported, but also self-defeating. The text does not distinguish between decision-makers. If the first sentence of §3584(a) contains an exclusive list of circumstances when "terms may run concurrently or consecutively," this limits not only *judges'* authority, but *BOP's* as well—it is a system-wide declaration. Indeed, the Government acknowledges that BOP is bound by §3584(a) in other respects, such as application of the default rules, U.S. Br. 35, and offers no reason why it is not bound here as well. The Government's exclusivist reading of §3584(a) would leave literally *no one* to make consecutive-or-concurrent determinations in cases like Setser's, and Setser and the Government fail to explain how BOP can. Conversely, if the two circumstances in the first sentence are *not* exclusive, then §3584(a) poses no obstacle to a consecutive-or-concurrent determination in unlisted circumstances, so long as the decision-maker can identify an independent source of authority. Federal judges certainly can do that.

2. *The first and third sentences of §3584(a) generate irresolvable ambiguity under the approach of Setser and the Government*

Nor can the exclusive-grant theory explain the ambiguity resulting from the phrasing of the first and third

sentences of §3584(a). Whereas the first sentence of §3584(a) addresses "imprisonment" that is

> imposed on a defendant who is already subject to an undischarged term of imprisonment,

and which clearly does not address Setser's case, the third sentence addresses "imprisonment" that is

> imposed at different times,

which certainly *does* embrace Setser's case. While Setser and the Government claim that the second and third sentences merely "specify what happens, in those two situations" set forth in the first sentence, U.S. Br. 9, they cannot explain how the very different words indented above mean *precisely the same thing*. Such a reading is the antithesis of "plain." Contrary to Setser's argument that Congress was just saving ink by using four words instead of fourteen,[5] Congress ordinarily repeats the same words to convey the same meaning—sometimes using definitions sections, sometimes reprinting tedious language over and over within a statute to avoid precisely the sort of ambiguity that Setser wishes away. *E.g.*, §1028 ("an identification document, authentication feature, or a false identification document"); 15 U.S.C. §2611(a) ("substance, mixture, or article").

There are other ways to account for this variation. If §3584(a) channels power, rather than "grants" it, the broader language in the third sentence may reflect Congress's understanding that courts possess inherent authority to make consecutive-or-concurrent determinations whenever sentences are "imposed at different times," §3584(a), but without imposing a default rule. See *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir.

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[5] "It is not necessary * * * to restate in the third sentence the restrictive clause," Setser asserts, because "[t]his limitation is implied by the placement of the sentence within the statute." Pet. Br. 19.

2001) (*per curiam*); *United States* v. *Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995). Yet *even if* the variation stems from inadvertence, a channeling interpretation leads to no greater surplusage than Setser's and the Government's approach, while avoiding the many problems of their take on the statute.

Another plain-text approach is found in *Romandine* v. *United States*, 206 F.3d 731 (7th Cir. 2000). In dicta, *Romandine* accepted the premise that the first sentence of §3584(a) defined the range of cases in which *judges* could sentence consecutively or concurrently. 206 F.3d at 737. Consequently, it concluded, courts lack such authority when sentencing anticipatorily. *Ibid.* But to give meaning to the third sentence's broader use of "imposed at different times," it concluded that the default rule *did* embrace anticipatory sentences—and with an iron grip. Judges could not modify it—an odd and harsh result (since the anticipatory context is the most variant and fact intensive), but a textual one. Thus, sentences like Setser's "run consecutively by force of law," *ibid.*, and are "automatically consecutive" whether the judge speaks or not. *Id.* at 738.[6]

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[6] Under *Romandine*, the judgment below would be affirmed, because the consecutive sentence would be automatic. Yet Setser does not cite *Romandine* at all, and the Government's criticism fails to explain why *Romandine*'s interpretation of "at different times" is inferior to the non-explanation offered by Setser and the Government. See U.S. Br. 14 n.3. But there is much to criticize about *Romandine* as well. Like Setser and the Government, it ignores the historical context of sentencing to assume that §3584(a) is the exclusive grant of authority. In contrast to its constricted view of judicial power, it oddly assumes power for the Attorney General to "make" an "automatically consecutive" federal sentence nonetheless "run concurrently." 206 F.3d at 738. And it does not explain why, if the statute is a "grant," the third sentence's concluding phrase "unless the court orders that the terms are to run concurrently" does not grant power with respect to all sentences that are imposed "at different times."

A fourth plain-text approach focuses on the third sentence of §3584(a). See, *e.g.*, *United States* v. *Ballard*, 6 F.3d 1502, 1505-1506 (11th Cir. 1993). Under this approach, the phrase "imposed at different times" encompasses anticipatory terms like Setser's, and the final default rule applies to anticipated terms. But that rule also provides that terms of imprisonment "imposed at different times run consecutively *unless the court orders* that the terms are to run concurrently." §3584(a) (emphasis added). This exception to the default rule can be read as coextensive with the default rule itself, authorizing courts to order concurrent sentences even when one term is anticipatory. After all, "the words 'unless the court otherwise directs' quite plainly vest some power in the court," because, if they do not, the option would be illusory and the text superfluous. *Farmer* v. *Arabian Am. Oil Co.*, 379 U.S. 227, 232 (1964) (quoting Fed. R. Civ. P. 54(d)) (overruled in part on other grounds, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)). Reading the third sentence as written creates an affirmative reason for rejecting the Government's premise that the *first* sentence must be the universal limit for authority. See U.S. Br. 13-14.[7]

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[7] The Government's claim that "reading the third sentence as an independent grant of authority would read the limitations in the first sentence out of Section 3584(a)," U.S. Br. 13, begs the central question whether the bulk of the first sentence contains any "limitations" on judges at all. Unlike the third sentence, which expressly contemplates judicial *power*, the first sentence expresses no judicial limit at all. Moreover, the first sentence would still do useful work by prohibiting consecutive terms for attempts and objects of the attempts for cases otherwise within the scope of the default rule. While this might theoretically permit attempt-object consecutive terms to be anticipatorily imposed, *id.* at 14, no evidence from real life or the logic of reasonableness review suggests the threat is real. See Part I.A.4, *supra*.

At most, then, Setser and the Government can argue that the text of § 3584(a) is ambiguous. And this ambiguity matters; all of the plain-text readings discussed above justify affirming the judgment below, except what Setser and the Government advance. Their simple approach, in a vacuum, may indeed seem appealing at first. But "in light of the foregoing textual and historical analysis, the initial plausibility of [that] reading simply does not carry the day." *Reno* v. *Koray*, 515 U.S. 50, 62 (1995).

3. *No plain text gives BOP exclusive authority over anticipatory sentencing*

Setser and the Government prefer to focus on § 3584(a) as the sole governing text. But that cannot be right, because § 3584(a) does not mention BOP—so if § 3584(a) actually withdrew sentencing authority from the courts, some other statute must grant it to BOP. *Both* of those actions—withdrawal from courts, transfer to BOP—are substantial. One would expect textual clarity for both. But no such grant to BOP exists; Setser and the Government, yet again, must rely on dubious implication. Pet. Br. 26-27; U.S. Br. 30, 37. The lack of any solid textual basis for BOP's claimed sentencing authority resolves any ambiguity as to whether § 3584(a) withdrew anticipatory sentencing authority from the courts—without the former, the latter is implausible. See *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008) ("When interpreting a statute, we examine related provisions in other parts of the U.S. Code.").

BOP's own overarching grant of authority appears in § 4042. Its core duties are the "management and regulation of all Federal penal and correctional institutions," "provid[ing] for the safekeeping, care, and subsistence" of the incarcerated, and establishing release and reentry "planning procedures." § 4042(a). That administrative focus is reflected throughout the Code. See, *e.g.*, § 3552(b) (presentence investigations and reports); § 3623

(transfer of prisoners to state authorities); §3624(b) (calculation of good-time credit); §3624(a), (d) (release of prisoners); §4012 (seizure of contraband in prisons).

As to sentencing, however, BOP lacks any statutory mandate. If, for example, BOP wants to reduce a sentence, Congress requires that it *go to court*. §3582(c). Unlike BOP's proper administrative tasks, criminal law and sentencing are "far outside *Chevron* territory." *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987). See also *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[t]he law in question, a criminal statute, is not administered by an agency but by the courts"); *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 265 (7th Cir. 1996) (Easterbrook, J.) ("we have substantial doubt that the Judicial Branch owes any deference to the Executive Branch when the question concerns the maximum term of imprisonment").

Nevertheless, Setser and the Government argue that BOP's authority to "designate the place of the prisoner's imprisonment," §3621(b), amounts to the authority to make the concurrent-or-consecutive decision because BOP may retroactively designate the state prison as the place where a federal sentence was served (making it concurrent) or not do so (making it consecutive). Pet. Br. 3-4, 26-27; U.S. Br. 30-38. That may be how BOP administratively enforces a court's consecutive-or-concurrent order. But §3621(b) does not displace judicial sentencing, giving BOP authority to engage in this fiction *on its own motion* to make the concurrent-or-consecutive determination that has historically been made by judges. Using expertise as the Nation's premiere corrections agency to select the proper kind of facility—minimum security, maximum security, etc.—is certainly within BOP's ambit, so long as it uses the correct administrative factors. See *Levine* v. *Apker*, 455 F.3d 71, 81 (2d Cir.

2006). Determining a sentence's *length*, however, is a different matter.

Section 3621(b)'s reference to "designat[ing] the place" of imprisonment does not remotely sound like an exclusive grant of sentencing authority in cases like Setser's. The statutory factors that BOP must consider when selecting the proper facility for each inmate are not the factors judges consider when selecting the proper length of imprisonment or when choosing between consecutive and concurrent sentences. Compare §3621(b) ("standards of health and habitability") with §§3584(b), 3553(a). BOP's factors are more administrative in nature, referring to such things as "the resources of the facility contemplated." §3621(b)(1). And in making the facility designation, BOP is not free to assess the goals of punishment according to its own views, but must consider "any statement by the court that imposed the sentence * * * concerning the purposes for which *the sentence* to imprisonment was determined to be warranted." §3621(b)(4) (emphasis added). BOP implements *courts'* sentences by choosing the appropriate facility. It certainly has no legislative mandate to exercise sentencing authority *to the exclusion* of courts. Section 3621, an unremarkable statute giving BOP the ability to select prisoners' accommodations, is not capacious enough for the authority claimed for BOP in this case.

Invoking §3621(b) for BOP's authority also has its ironies, given the textual methodology Setser and the Government use to construe §3584(a). Section 3621(b) makes clear that "[a]ny order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment *in a community corrections facility* shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment." (Emphasis added.) Does specifying *one* instance when BOP has exclusive authority imply that in

all *unspecified* contexts BOP does not? The answer should be "yes" if, as the Government and Setser believe, the enumeration of two sentencing contexts in §3584(a) means that judicial power in all the others is implicitly revoked. Pet. Br. 14-17; U.S. Br. 10-12. But the correct answer is "no." BOP's historical, exclusive administrative authority over prisons, see *Tapia*, 131 S. Ct. at 2390-2391, is not impliedly repealed by text *reaffirming* that authority in a specific context. Just so here.

In both §3621(b) and §3584(a), Congress legislated in the light of history, and history may resolve questions that text leaves unclear. History reveals that BOP properly determines where prisoners should be housed—and that sentencing discretion belongs with the Judiciary. Modifying either would invite potentially significant intrusions by both branches of government into each other's sphere. See *infra* Part III. Such drastic modifications should not be inferred absent a clear congressional statement—something wholly missing here.

C. The legislative history supports judicial discretion, not judicial silence

Setser and the Government both invoke legislative history, but it—like the text and historical background—favors judicial discretion, not judicial silence. Whereas Setser and the Government interpret the Sentencing Reform Act to enhance the Executive's power over sentence lengths, the legislative history reveals hostility to such executive power. And while they interpret the statute to silence judges in cases like Setser's, the legislative history shows a strong intent to amplify the judicial voice.

1. *Congress intended to diminish, not magnify, the Executive's role in sentencing*

This Court has previously recognized "Congress' 'strong feeling' that sentencing has been and should remain 'primarily a judicial function.'" *Mistretta* v. *United*

States, 488 U.S. 361, 390 (1989) (quoting Report at 159). Indeed, the legislative history reveals concentrated animosity toward previous incursions by the Executive. Before the Act's enactment, the Parole Commission generally had complete authority to release a prisoner (or not) at any point after one-third of the sentence had passed. See K. Stith & J. Cabranes, Fear of Judging 19 (1998). Troubled by the distinction between an open judiciary and a closed bureaucracy, Congress decried the "problem that *actual* terms of imprisonment are determined in private rather than public proceedings." Report at 55 (emphasis added). These rule-of-law and separation-of-powers concerns were enhanced by "the degree of restriction on liberty that results from imprisonment," *id.* at 59; see *id.* at 77.

For this reason, Congress rejected executive entreaties to retain the Parole Commission's role.[8] Doing so "would perpetuate the current problem that *judges* do not control the determination of the length of a prison term even though this function is *particularly judicial in nature*." Report at 54 (emphases added). Executive determinations amounted to sentencing, and "[t]he better view is that sentencing should be within the province of the judiciary. Indeed, it is arguable that the Parole Commission by basing its decision on factors already known at the time of sentencing, has already *usurped a function of the judiciary*." *Ibid.* (emphasis added).

Except for "minor adjustments based on prison behavior called 'good time,'" Congress expected prisoners' total debt to the United States to be calculated *at sentencing*. Report at 46. It wanted all parties to be "certain about the sentence and the reasons for it." *Id.* at 39.

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[8] The Act reduced the Parole Commission to a shadow of its former self. It now has sentence-adjustment authority limited to District of Columbia local crimes. See http://www.justice.gov/uspc/history.htm.

Sentencing results were to be left to the *Judiciary*: Congress "finds totally unacceptable" the possibility that the Executive "would review and amend a sentence after a United States court of appeals had already found it to be reasonable." *Id.* at 55.

Simultaneously, the Report reveals Congress's view that BOP's institutional role is to implement—not impose—sentences. *E.g.*, Report at 57 (administrative responsibilities). When describing newly adopted §3584, the Report does not even *mention* BOP, see Report at 125-128, much less suggest that it has a substantial role to play. And in discussing §3621, the Report gives no hint that the facility-designation authority is a backdoor route to BOP power over concurrent-or-consecutive decision-making, whether in anticipatory or other sentencing contexts. See Report at 141-142. Compared to the illustrious power described by Setser and the Government, the Report describes facility-designation authority as wholly administrative—concerning "such matters as place of confinement of prisoners, transfers of prisoners, and correctional programs." *Id.* at 141. It emphasizes that designating the "place of confinement" really means *choosing the right facility* by insisting on minimum standards of health, *ibid.*, and it lists the factors that BOP "is specifically required to consider" in making that choice, *id.* at 142.

To put it mildly, the Report has no kind words for executive involvement in individual sentencing.

2. *Congress intended for judges to be in control of sentencing, both formally and substantively*

Beyond minimizing executive intrusion in sentencing, Congress sought to encourage judges to exercise their traditional authority to make concurrent-or-consecutive determinations. The Report explains that §3584(a)

> is intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject. However, the Committee hopes that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively.

Report at 127. Five things are readily apparent. First, and most importantly, Congress recognized courts' long-standing authority to order that multiple sentences run concurrently or consecutively, and it stated no exception to that authority for anticipatory sentencing. Second, Congress regarded § 3584(a) *only* as a default rule—it authorizes nothing, it takes nothing away.[9] Third, Congress wanted *more* judicial guidance, not less. The default rules, where applicable, serve as a last resort, but it was "hope[d]" that they would remain dormant as judges gave individualized determinations. Fourth, Congress explicitly chose not to *require* courts to speak, even though it plainly preferred that they do. Fifth, Congress wanted a default rule to eliminate uncertainty, foster finality, and prevent further litigation whenever possible.

Congress desired judicial guidance as to the *actual* "length of a prison term." Report at 54. Over and again, the Report emphasized the importance of "Federal *judges* * * * select[ing] from among the available alternatives an appropriate sentence to impose upon the particular defendants before them." *Id.* at 49. *"[S]entencing judges"* must "consider [statutory purposes] in imposing sentence," *id.* at 60 (emphasis added), and the "*sentencing judge* [must] announce how the guidelines apply * * * and * * * give his reasons for the sentence imposed."

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[9] Consecutive sentences for attempts and their sole objects are withdrawn from the scope of § 3584(a). See Part I.B.1, *supra*.

Ibid. (emphasis added). It was for "[t]he *judge* * * * to give * * * specific reasons for imposing a sentence of a different kind or *length* than recommended in the guidelines." *Ibid.* (emphasis added).[10]

3. *Snippets that merely replicate, rather than explain, the text are unenlightening*

Setser and the Government ignore the language describing Congress's desire to free sentencing from executive oversight and to ensure greater certainty and fairer individualization of sentences. Instead, they invoke legislative history that essentially quotes, but does not explain, the statutory text. Pet. Br. 22-23; U.S. Br. 21-23. They are correct about this much: The legislative history does not explicitly approve of sentencing orders that make a sentence run consecutively or concurrently to an anticipated sentence. But neither are such orders explicitly *dis*approved.[11] As shown, however, the singular thrust of the legislative history militates strongly against Setser's and the Government's approach.

The Government largely relies on the National Commission's report, but to no avail. See U.S. Br. 21-23. Like the legislative history of the Act, the report of the

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[10] Congress also clarified for courts that they *did* have concurrent-sentencing authority in the dual-sovereign context—a clarification that was necessary because some courts had misread old-§ 3568 to preclude that authority (in *any* context). See, *e.g.*, *United States* v. *Segal*, 549 F.2d 1293, 1301 (9th Cir. 1977); Report at 127 n.314 ("it is intended that this provision be construed contrary to the holding in" *Segal*).

[11] The same is true of the Guidelines. "In more than two decades," the Government observes, the Sentencing Commission "has never promulgated guidelines or policy statements" in the anticipatory-sentencing context. U.S. Br. 24. But the circuit split has existed for the same two decades, during which the Commission has never *dis*approved anticipatory sentences or lifted a finger to discourage their use. This silence may cut against, but cannot aid, the Government.

Commission never explicitly addresses anticipatory sentences. But it would not matter even if it had. If Congress loosely based §3584(a) on the Commission's proposal, Congress edited heavily. Unlike §3584(a), the Commission's proposal *did* read as a grant of authority to courts—meaning that if Congress wrote §3584(a) in light of the Commission's proposal, it consciously rejected that crucial feature. See Final Report of the National Commission on Reform of Federal Criminal Laws 291 (1971). Congress's repudiation of the Commission's proposal in that respect was hardly unique. Over the Commission's contrary view, *id.* at 299-304, Congress abolished parole, largely based on the very separation-of-powers concerns that undermine the Government's argument here. Congress's differences with the Commission reflect how hostile Congress really was to executive intrusion into the judicial role.

II. Adverse Consequences Flow Not From Retaining, But From Limiting, Judicial Discretion

According to Setser and the Government, disastrous consequences will surely flow from the judicial retention of anticipatory sentencing authority. Pet. Br. 28-29; U.S. Br. 13-15, 18-20. First, they say, judicial discretion would lead to bizarre and uninformed results. Second, invoking federalism, they claim that only federal judges' silence prevents disrespect for state judges. Both points are meritless—indeed, backwards. Unsurprisingly, Setser's own sentence was reasonable—a factbound question properly answered by the court below under a proper legal framework.

A. Reasonableness review on appeal resolves any practical problems

Under the judgment below, sentences anticipatorily made consecutive or concurrent are reviewed for reasonableness on appeal. J.A. 56-57. As with all sentences,

this is the command of Congress, see §3584(b) (specifically addressing concurrent-or-consecutive decisions); §3742(a)(1), and of this Court, see, *e.g.*, *United States* v. *Rita*, 551 U.S. 338, 354-358 (2007); *Booker*, 543 U.S. at 261-263.

Reasonableness review eliminates the risk of bizarre, arbitrary, uninformed, or unreasoned sentences—anticipatory or otherwise. In the anticipatory-sentencing context, the worries about abuses of discretion expressed by Setser and the Government give too little credit to the district courts. No evidence suggests that judges in that half of the country currently possessing this power have used it oppressively. On the other hand, courts in the remaining half have expressed dissatisfaction with this power being left to BOP. A Second Circuit panel, for instance, expressed discomfort with circuit precedent, and even directed its opinion be sent to members of Congress. See *Abdul-Malik*, 403 F.3d at 74-76 ("BOP has the effective authority to determine how the sentences should run" simply because the federal court imposed sentence before the state court did—an authority that "BOP lacks" if the timing is reversed); *Reynolds* v. *Thomas*, 603 F.3d 1144, 1160 (9th Cir. 2010) (W. Fletcher, J., concurring) (pet. filed) ("an important sentencing decision may be made by the executive rather than the judicial branch").

Even assuming that judicial errors will occur, total elimination of anticipatory sentencing by *courts* is unjustified—particularly since the alternative is sentencing by *BOP*. The possibility of abuse inheres in discretion, but judges' mistakes in specific cases can be redressed on appeal. "At times, [district courts] will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." *Rita*, 551 U.S. at 354.

The result is a developing jurisprudence that guides the exercise of discretion. Cf. Report at 52 (anticipating

body of case law regarding Guidelines). Nothing prevents the development of such guidance in the anticipatory context—except, of course, the rule of silence proposed by Setser and the Government. Appellate courts routinely vacate sentences and remand for resentencing when the district court's sentence is unreasonable, regardless of context. See, *e.g.*, *United States* v. *Taylor*, 648 F.3d 417, 429 (6th Cir. 2011) (remanding for resentencing when district court did not "consider the merits of a statutorily relevant sentencing argument"); *United States* v. *Dorvee*, 616 F.3d 174, 183-184 (2d Cir. 2010) (finding within-Guidelines child-pornography-distribution sentence unreasonable); *United States* v. *Paul*, 561 F.3d 970, 975 (9th Cir. 2009) (*per curiam*) (remanding to different district court judge where first judge repeatedly and unreasonably gave excessive weight to one factor); *United States* v. *Omole*, 523 F.3d 691, 700 (7th Cir. 2008) (remanding sentence given lack of a "compelling justification for the 'break' [defendant] caught at sentencing"). And at least one court has remanded for resentencing because a district court was silent in a *non*-anticipatory case as to the concurrent-or-consecutive question—even though §3584(a) provides default rules for silence in that context. See *United States* v. *Martin*, 371 F. App'x 602, 606 (6th Cir. 2010).

Over time, some anticipatory sentences will surely be vacated for resentencing; some may be vacated because it was unreasonable to make the concurrent-or-consecutive determination at all. In *United States* v. *Smith*, for instance, the district court "order[ed] that its sentence run consecutively to 'any other sentence in any other case.'" 472 F.3d 222, 225 (4th Cir. 2006). The Fourth Circuit reversed—not (as it should have done) because running a sentence consecutive to *unknown* future cases was unreasonable under §3584(b) and §3553(a), but because, like Setser and the Government, it

erroneously read §3584(a) to preclude *all* anticipatory sentencing. *Smith*, *supra*, at 226. *Smith* reached the right result, but for a wrong, needlessly broad reason.

District courts can readily apply the §3553(a) factors in many anticipatory contexts. Sometimes the *only* unfinished state proceeding is sentencing. See, *e.g.*, *United States* v. *Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (barring anticipatory sentence even though state sentencing followed federal sentencing by *one day*). Sometimes the same conduct offends both sovereigns, so the federal judge may confidently run the sentences concurrently—the benefit Setser himself received as to one state sentence. J.A. 15-16. Alternatively, a federal judge may know that the state-court case is sufficiently distinct as to desire consecutive sentences, avoiding double-counting. See Report at 127. The eventual state sentence may not matter in various other cases, where the federal court is aware of a state statutory maximum, but considers even that amount too low to justify making the federal sentence concurrent. Or, with knowledge of the offender and the offenses, the federal court may conclude that a concurrent sentence suffices no matter how *little* time the state court imposes. Appellate courts in turn, like the court below, review such anticipatory sentences for reasonableness. J.A. 60-62; *Mayotte*, 249 F.3d at 799; *Ballard*, 6 F.3d at 1504, 1506-1510 (quoting the district court's careful analysis under §3553(a) and affirming anticipatory sentence).

B. Setser's own sentence is reasonable

Setser's second question presented, challenging his sentence even if judicial authority is upheld, is meritless. He argues that his federal sentence "contradicts itself and cannot be fully implemented." Pet. Br. 37. But his run of good fortune—a partially concurrent federal sentence, receiving state sentences running concurrent with each other, and being paroled well before even the short-

est state term expired—hardly makes the federal sentence "impossible to implement." *Id.* at 38. Neither the state nor federal sentence was frustrated. While complaining that it generated an impossible sentence, Setser also is quick to demand that the concurrent part of the sentence be left in place. *Id.* at 43 (asking the Court to "strik[e] the consecutive order, but leav[e] intact the concurrent order").

It is hard to see how the "consecutive order" could *not* be reasonable. Setser was *on probation for another conviction* when he committed the drug-possession crime that offended both sovereigns. The Government notes that this alone justifies consecutive treatment. U.S. Br. 17 n.5. Nor was the district judge sentencing in the dark. Setser's state proceedings were ongoing when the Government "borrowed" him. J.A. 15-16. The PSR described and the district judge plainly understood the state charges, which he precisely listed by state docket number and carefully distinguished. J.A. 16, 77-78. That federal credit should be granted as to the joint offense, but denied as to state-probation revocation, is reasonable and sensible. It was a split sentence tailored to Setser's individual circumstances. That resolves the reasonableness question.

Setser's federal-court sentence gave him one key benefit—a right that anything beyond five years in state prison be credited against his 151-month federal sentence. There is no risk of deprivation, since he was released well before five years into his state sentence. And if there is latent ambiguity, the Government suggests that this is the sort of thing BOP—an administrative agency—can iron out, pursuant to a *nunc pro tunc* request. U.S. Br. 36 n.21. *This* kind of resolution—not sentencing in the first instance—is indeed a clearly appropriate role for BOP, subject to judicial review if necessary. But that function must be limited "to common

sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). Administratively processing sentences from dual sovereigns—harmonizing data points that may not immediately jibe—is similar to the work BOP must do whenever guidance from courts is inadequate or missing. That sentence-implementing role is in stark contrast to the purported assumption of sentencing power itself.

Setser's sentences were not imposed in a vacuum. Once he received his concurrent-sentencing order from the federal court, what he did with it when he returned to state court was up to him. If the Texas court "had no knowledge of the [federal] sentence, [Setser] has no one to blame but himself for not bringing the fact to its attention." *Mees*, 272 N.W.2d at 68. See Tex. Code Crim. Proc. art. 37.07(3)(a)(1) (allowing prior criminal record to be brought before sentencing judge). The same is true if he failed to seek modification or clarification once the state sentence was imposed. See *State* v. *Aguilera*, 165 S.W.3d 695, 697-698 (Tex. Crim. App. 2005) (trial court's authority to modify sentence). As with his Fifth Circuit briefing, Setser is silent regarding any such efforts. See Pet. Br. 7-8 (describing state proceedings).

Even so, Setser *still* benefits from the court order declaring his right to credit for a particular state sentence. While he apparently has not bothered to make the effort, see U.S. Br. 36 n.21, nothing prevents him from attempting to show that some time served in state prison was attributable solely to the ten-year sentence for the 2007 drug-possession offense—the sentence the federal court intended to be concurrent. If he can make that showing, then BOP should credit that time via a *nunc pro tunc* designation, and if it does not, after exhausting administrative remedies, Setser can pursue the claim in court under 28 U.S.C. §2241. See *Barden* v. *Keohane*, 921 F.2d

476, 480-484 (3d Cir. 1991); 28 C.F.R. 542.10 *et seq.* Setser has, or could obtain, the necessary parole records and other materials for submission to BOP.[12] By making the case for how long he likely would have served for the shorter sentence—the revoked probation—had it stood alone, he can show that the balance was for the joint offense.[13]

Regardless of how the factbound details may ultimately shake out, it is implausible for Setser to contend that the district court's guidance was worse than none at all. Had the district court been silent, Setser would have no more than a hope for BOP's solicitude. See U.S. Br. 37 (noting that consecutive treatment is probably appropriate); BOP Program Statement No. 5160.05, §8 (Jan. 16, 2003) (designation of state institution requires affirmative finding of propriety). Because the court instead

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[12] Texas inmates can obtain data regarding good-conduct and time-earnings status every six months. See Tex. Dept. Crim. Justice Unit Classification Procedure 2.01, Time-Earning Status and Good-Conduct Time Information, Section VI, Printing PCRS Time Slips Per Offender Request. Inmates can dispute the calculations. Tex. Gov't Code § 501.0081. Upon release, the prisoner receives discharge papers including the calendar time actually served. *Id.* § 501.016(a)(5).

[13] For example, Texas inmates generally become eligible for release on parole when their "actual calendar time served plus good-conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less." Tex. Gov't Code § 508.145(f). Setser would have been eligible for parole after serving 15 months of the five-year sentence, but had to wait for approximately 29 months of the ten-year sentence. See *Ex parte Alexander*, 861 S.W.2d 921, 924 (Tex. Crim. App. 1993), superseded on other grounds by Tex. Code Crim. Proc. art. 11.07. The difference in parole-eligibility dates, combined with data on how quickly parole was actually granted, provides Setser and BOP some basis for determining how much time to allocate to the "concurrent" portion of the federal sentence. Setser could have begun earning concurrent federal credit in month 16, for a total of 13 months credit toward his federal sentence.

spoke, and granted Setser a partially concurrent sentence, Setser can at least make his case. Receiving an individually tailored, logical sentence has not prejudiced him in the slightest. He was sentenced reasonably, and his sentence should be affirmed.

C. Federalism is advanced, not impeded, by federal judges determining the concurrent or consecutive effect of a federal sentence

1. Setser, see Pet. Br. 30-33, and to a lesser extent the Government, see U.S. Br. 27-29, invoke federalism and comity as a basis for silencing federal courts in cases like Setser's. This is exactly backwards. Only certainty regarding the eventual federal sentence permits the state court to sentence with precision.

Sentences instruct the prison of the *same sovereign*. A federal sentence tells BOP how long to keep a prisoner; a state sentence tells the state prison the same thing. Courts cannot command jailers of the other sovereign. See, *e.g.*, *Abdul-Malik*, 403 F.3d at 72 ("'[T]he state court's intent is not binding on federal authorities.'" (quoting *McCarthy* v. *Doe*, 146 F.3d 118, 120-21 (2d Cir. 1998))); *Opela* v. *United States*, 415 F.2d 231, 232 (5th Cir. 1969).[14] But a *federal* judge determining the effect of

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[14] Setser claims that "[t]he state court * * * imposed both state sentences concurrently with the previously imposed federal sentence." Pet. Br. 32. The judgments say no such thing. J.A. 29-40. Nor, contrary to Setser's assertion, does such a recommendation arise by operation of Texas law. Setser cites *Ex parte Spears*, 235 S.W.2d 917 (Tex. Crim. App. 1950), but that case presumed concurrence only when the state court "failed to cumulate the state sentence with the [preexisting] Federal sentence *and then returned [the defendant] to the Federal authorities*." *Id.* at 917 (emphasis added). Where, as here, the federal sentence is served last, *Spears* is irrelevant. Indeed, Texas courts correctly note that state judges lack any power over the administration of the federal sentence. *Ex parte Moody*, 991 S.W.2d 856, 859 (Tex. Crim. App. 1999). The other case cited by

a *federal* sentence cannot possibly violate federalism. Instead, dual sovereignty "requires * * * a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure." *Ponzi* v. *Fessenden*, 258 U.S. 254, 259 (1922). In this context, withholding information from state courts increases the inevitable friction in our system. Transparent sentencing in the dual-sovereign context reduces it.

Federal judges who sentence anticipatorily expect that state courts will know of the federal sentence, see *Ballard*, 6 F.3d at 1504, and recognize that the state court, pursuant to state law, may adjust their sentences as they please to achieve more or less punishment.[15] Indeed, the Government inadvertently acknowledges as much, citing *Romandine* for the proposition that "the second judge can impose a term of imprisonment, but with 'a discount * * * on account of [the] undischarged federal sentence.'" U.S. Br. 28 (quoting 206 F.3d at 738). But under *Romandine*, anticipatory sentences are "automatically consecutive," 206 F.3d at 738, which—contrary to the regime the Government proposes—means that the state court would *know* the effect of the federal sentence.

Consider two hypothetical defendants, P and Q, subject to the same sentencing-and-incarceration sequence

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Setser is also irrelevant; it simply authorizes state sentences to run consecutively to prior federal sentences. Pet. Br. 7 (citing *Cook* v. *State*, 824 S.W.2d 634, 640-643 (Tex. App. 1991)).

[15] Even if state law requires a mandatory minimum, state judges who would prefer that minimum sentence to be served concurrently to a federal sentence are never worse off by being *aware*, ex ante, of how the federal sentence will run. States' authority "over the administration of their criminal justice system lies at the core of their sovereign status." *Ice*, 555 U.S. at 170. If a State has laws limiting the discretion of its judges, it is unreasonable to lay that self-inflicted "injury" at federalism's door.

as Setser. P and Q are both sentenced to five years by the federal court. The court makes P's sentence consecutive, but is silent about Q's. The state court wishes both to spend at least seven, but no more than nine, years in prison. Knowing that P will spend five years in prison regardless of the state sentence, the state court can sentence P to between two and four years. But it is uncertain in Q's case. Concerned that BOP will later determine the federal sentence to be concurrent, the state court could sentence Q to seven years. But BOP may treat the sentence consecutively—in which case, Q would spend 12 years in prison. Yet if the state court sentences Q to only two years, he may wind up serving only five, if in the end BOP treats the state sentence as concurrent. Because it provides state courts with knowledge relevant to their own criminal proceedings, transparent sentencing in cases like Setser's is far more respectful of States' dignity than a mandatory silence that allows BOP to thwart state courts' attempts to impose a just sentence.

Federal guidance on the effect of federal sentences is particularly important because when the state court sentences second and imprisons first, any shading it chooses to give the *federal* sentence is unenforceable. In *Clark* v. *State*, a federal court was silent, but a subsequent South Carolina state-court plea bargain treated the state sentence as concurrent with the as-yet-unserved federal sentence. *Clark* v. *State*, 468 S.E.2d 653, 654 (S.C. 1996) (*per curiam*). The South Carolina Supreme Court readily agreed that the concurrent-or-consecutive effect of a first-imposed federal sentence "is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently obtained state court conviction," *id.* at 655 (citing *Bloomgren* v. *Belaski*, 948 F.2d 688 (10th Cir. 1991)), and that "a state court is without authority to modify or place conditions on a sentence from a foreign jurisdiction." *Ibid.* Thus, it held, "it

appears the only way to effectuate a state trial court's order that a state sentence run concurrently with a prior federal sentence is to have the defendant returned to federal custody to serve his federal sentence." *Ibid.* That way Clark would satisfy his federal-prison obligation, and the State, by placing a detainer on him, would be able to imprison him only for the balance of the time. *Id.* at 655 n.3. Neither sovereign would be offended. But this "bureaucratic quagmire," *id.* at 655 n.1, could have been avoided had the state court simply *known* how long the federal sentence would be.

Second-sentencing (usually state) courts can sentence justly and confidently only by knowing *ex ante* whether the federal sentence is concurrent or consecutive—not just the number of years subject to a later concurrent-or-consecutive determination by BOP. It is hard to imagine any actual state-court judge being grateful for the ignorance that Setser and the Government would foist upon them in the name of "federalism."

2. Setser and the Government also decry the disastrous consequences that would attend construing the statute to authorize anticipatory sentences when the impending sentence is in *federal* court. But both merits briefs' Questions Presented properly limit the issue to whether federal courts can make sentences concurrent or consecutive to anticipated *state* sentences. Nor is there a circuit split on the parallel question in the federal/federal context; indeed, it appears that Setser and the Government have a solution in search of a problem. See U.S. Br. 18-20. Even setting that aside, the argument is specious.

First, Setser and the Government fail to note that a federal sentence anticipating a state sentence has materially different consequences for all parties than one anticipating another federal sentence. In the dual-sovereign context, anticipatory sentencing carries no true risk of inconsistency. The prison of each sovereign takes

instruction from the courts *of that sovereign*. A federal court ordering that *its own* sentence be consecutive to an impending state sentence has no effect on the state—the state may keep the prisoner for as long or as short as it desires, and then release the prisoner to BOP, which will follow the federal judge's order. BOP properly states in its Program Statements that it is not bound by a state court's "request" that the inmate's state sentence be served concurrently to his federal sentence. See BOP Program Statement No. 5160.05, § 9(b)(5) (Jan. 16, 2003) (detailing procedure in which BOP evaluates "a request from a state jurisdiction indicating that the state and federal sentences are to be served concurrently"). See also, *e.g.*, *Taylor* v. *Sawyer*, 284 F.3d 1143, 1151-1153 (9th Cir. 2002) (state courts cannot control federal sentences); *Ballard*, 6 F.3d at 1509 n.9 (anticipatory sentencing permissible and workable "because punishment by two sovereigns is involved").

By contrast, if a federal court makes its sentence concurrent or consecutive to an anticipated federal sentence, the *same* jailer (BOP) must attempt to execute *both* sentences. This may generate inconsistency, and so precluding that sort of anticipatory sentence makes sense. See *United States* v. *Quintana-Gomez*, 521 F.3d 495, 498 (5th Cir. 2008). And federal sentences anticipating future federal sentences might, for that reason alone, be categorically "unreasonable" under §3553(a), whether or not §3584(a) itself forbids them as well.

Such a scenario—if it ever emerges again—can be avoided by the appellate courts' exercise of their supervisory authority. See, *e.g.*, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957) ("We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."). Cf. *Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) (absent contrary instruction from

Congress, rules governing district courts are in the Judiciary's purview). Internally developing coherent rules of sentencing sequencing—i.e., the Judiciary managing itself—raises none of the separation-of-powers or institutional competency concerns that would arise from the transfer of all anticipatory sentencing authority to the Executive. See Part III.A, *infra*.

And failing that, even if a district court *did* attempt to impose such an anticipatory sentence, the second court will always have the upper hand. If the first sentence were ordered to run concurrent to the second, the second judge could lengthen her sentence; if the first judge had demanded consecutive service, she could shorten it. Given that the Guidelines are only advisory and that reasonableness is the touchstone of all sentencing, achieving that result would be far easier now than before expansive discretion was reintroduced in *Booker*, 543 U.S. at 243. If nothing else, the second judge could simply clarify for BOP precisely how long the prisoner is to be in their custody, effectively superseding the prior sentence, as in *United States* v. *Joseph*, No. 03-214, 2010 WL 5288736, at *1 (E.D. La. Dec. 16, 2010).

Whatever else the potential federal/federal sentencing order may entail, it does not offer any reason for wholesale withdrawal of *all* anticipatory-sentencing authority in every context.

III. The Court Should Avoid An Interpretation That Poses Serious Constitutional Questions

Setser and the Government ask the Court to drive the statute headlong into a constitutional thicket. Their reading of § 3584(a) should be rejected based on text and history. But even setting that aside, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is

plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Construing the statute to leave discretion with the courts is not "plainly contrary to the intent of Congress." *Ibid.* By contrast, mandating judicial silence, and transferring sentencing authority to the Executive, would "raise serious constitutional problems." *Ibid.* That construction would require the Court to confront the thorny issues it avoided many years ago—"the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch." *Mistretta*, 488 U.S. at 391 n.17. The Court should therefore resolve any remaining doubt about the statute in favor of the construction that leaves discretion with the courts.

A. The rule of silence is in tension with the separation of powers

This case will decide whether the Judiciary or the Executive has ultimate sentencing authority in cases like Setser's. "Separation-of-powers concerns * * * caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana* v. *Holder*, 130 S. Ct. 827, 831 (2010). See *supra* Part I.A.3 (describing clear-statement prerequisite to reading statute as divesting courts of discretion or jurisdiction).

1. Just last Term, this Court held that statutes unambiguously vesting judicial authority outside Article III are unconstitutional. *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011). *Stern* alone is sufficient to cast grave constitutional doubt on the reading advanced by Setser and the Government.

Stern held that the resolution of state-law counterclaims by bankruptcy judges violated the separation of powers. 131 S. Ct. at 2620. Transferring sentencing authority from Article III judges to BOP violates the same principle, only far more egregiously. Authority in the hands of bankruptcy judges—who are appointed by the court of appeals, whose cases can be withdrawn by the district court, whose decisions are subject to direct appellate review, and who are subject to no Executive oversight—surely threatens the separation of powers less than the authority claimed for BOP, in which none of those protections apply.

While *Stern* recognized a "public rights" exception to mandatory Article III jurisdiction, that exception does not implicate sentencing, because there is no argument that sentences "'historically could have been determined exclusively by'" the Executive or Congress. 131 S. Ct. at 2610 (quoting *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 67-68 (1982) (plurality opinion)). Individual sentencing—determining how much liberty a citizen must lose—has never been a historical function of any branch other than the Judiciary. "[U]nder our constitutional system the right to * * * impose the punishment provided by law, is judicial," *Ex parte United States*, 242 U.S. 27, 41-42 (1916), and has always been. If sentencing was within the province of "'the courts at Westminster in 1789,'" *Stern*, *supra*, at 2609 (quoting *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)), it is in the province of "Article III judges in Article III courts" today. *Ibid.* Congress *could*, of course, fix a single penalty for a given crime "without giving the courts any sentencing discretion" to deviate. *Chapman* v. *United States*, 500 U.S. 453, 467 (1991). But it did not do so.

Individualized sentencing is perhaps the most "prototypical exercise of judicial power." *Stern*, 131 S. Ct. at

2615.[16] "A separation of powers issue arises when the same branch of government that prosecutes federal prisoners determines concurrency in lieu of the judge." *Abdul-Malik*, 403 F.3d at 76.[17] If such core judicial attributes could be eroded, "Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Stern*, 131 S. Ct. at 2615.

BOP's power to choose where a sentence is served cannot morph into the power to choose how long that sentence lasts. Just as "Congress may not bypass Article III just because a proceeding may have *some* bearing on a bankruptcy case," *Stern*, 131 S. Ct. at 2618, it may not—and in §3584(a) *did* not—bypass Article III just because the length of a sentence may have *some* bearing on BOP's designation of prisons under §3621(b).

Likewise, the Court in *Stern* was troubled that bankruptcy courts can make the "final determination"—in the sense that further review was not *de novo*—in cases arising under Article III. 131 S. Ct. at 2619. BOP's sentencing decisions in cases like Setser's allow for even *less* judicial review—only a collateral attack under 28 U.S.C. §2241. See Part III.B, *infra*.

To be sure, the question in this case is "narrow," affecting only that set of cases in the dual-sovereignty context that follow Setser's sequence of sentencing and in-

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[16] Sentencing is such a core judicial function that even having someone else *mouth the words* of the sentence—in the judge's presence—is inappropriate. Some courts required "the clerk physically to pronounce the sentence *** while the judge was sitting on the bench," but "the pronouncement of sentence is so important it should come from the judge." 3 C. Wright & S. Welling, Federal Practice and Procedure §538, p. 198 (4th ed. 2011).

[17] "The implications of this discretion are worrisome and unresolved, but we are bound by our precedent." *Abdul-Malik*, 403 F.3d at 76.

carceration. But *Stern* readily characterized the question it addressed as "narrow," too. 131 S. Ct. at 2620. As to whether "narrow" separation-of-powers incursions merit vigilant response, "[t]he short but emphatic answer is yes." *Ibid.* "A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." *Ibid.*[18]

2. This Court's painstaking allocation of institutional authority pertaining to the length of sentences *within* the judicial process, in cases like *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), indicates that transferring sentencing authority *outside* that process altogether is at least questionable. *Oregon* v. *Ice*, for instance, addressed the constitutionality of leaving consecutive-or-concurrent sentencing authority with judges under Oregon's statutory scheme. 555 U.S. at 164. But neither the majority nor the dissenting opinion lends support to giving the decision neither to the judge nor to the jury, but to the jailer instead. Both opinions recognized the significance of a consecutive sentence. See, *e.g.*, *id.* at 171-172; *id.* at

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[18] Indeed, the courts of appeals have repeatedly invalidated delegations to BOP and probation officers of far less consequential judicial authority than consecutive-or-concurrent sentencing power. See *United States* v. *Mike*, 632 F.3d 686, 695-696 (10th Cir. 2011) ("granting the probation officer the discretion to decide whether [inpatient sex-offender treatment] will be imposed is tantamount to allowing him to decide the nature or extent of the defendant's punishment" and therefore an unconstitutional delegation of judicial power); *United States* v. *Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009) (same); *United States* v. *Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) (same with respect to decision to require "mental health treatment"); *United States* v. *Kent*, 209 F.3d 1073, 1078-1079 (8th Cir. 2000) (same with respect to decision to require "psychiatric treatment"); *United States* v. *Kinlock*, 174 F.3d 297, 300 (2nd Cir. 1999) (same with respect to delegation to BOP to determine amount and timing of restitution payments); *United States* v. *Johnson*, 48 F.3d 806, 807-809 (4th Cir. 1995) (same).

174 (Scalia, J., dissenting). Quite unlike parole—which, as described above, troubled Congress on separation-of-powers grounds, Report at 54-55—the power at issue in this case *determines* the sentence imposed, and can lengthen as well as shorten it.

3. The Government suggests that judges are adequately involved because, it says, BOP routinely seeks their advice. U.S. Br. 34-35. This only exacerbates the problem. Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995). The Government, at least in cases like Setser's, would ask the judge to play the same advisory role vis-à-vis BOP officials that probation officers play vis-à-vis the judge. Judges do not advise; they *decide*.

This Court has rejected a federal-court advisory role at least since 1793, when Secretary of State Jefferson told this Court that President Washington "would be much relieved" to receive answers to specific questions that "would secure us against errors dangerous to the peace of the United States" as the new republic struggled in the midst of international turmoil. 6 Documentary History of the Supreme Court of the United States, 1789-1800, p. 747 (M. Marcus ed. 1998)) (reprinting letter of July 18, 1793). The Court respectfully declined, citing "[t]he Lines of Separation" established by the Constitution. *Id.* at 755 (reprinting letter to President Washington of Aug. 8, 1793). If at a momentous point in history, this Court declined to provide advisory opinions for Thomas Jefferson, asking on behalf of George Washington, it is hard to see why federal judges today should

provide advisory opinions for the "chief" of BOP's "Designation and Sentence Computation Center."[19]

To the contrary, when a judgment becomes final, it "becomes the last word of the judicial department." *Plaut*, 514 U.S. at 227. The Government, however, argues that the *real* last word comes long after the judgment is final—and comes in the form of advice to a bureaucrat. U.S. Br. 34-35. Alternatively, BOP suggests that courts can go ahead and provide their advice up front, sparing BOP "the need to return to the judge, perhaps years later, to ascertain the intent of the judge." Sadowski, Interaction of Federal and State Sentences When the Federal Defendant Is Under State Primary Jurisdiction 3 (July 7, 2011).[20] That is, *even when a judge has enough knowledge* to sentence in a timely fashion, BOP still considers her to be its advisor, and no more.[21] That is intolerable. See *Reynolds*, 603 F.3d at 1161 (W. Fletcher, J., concurring) (describing BOP's treatment of judges as advisory).

4. The Constitution does give the Executive authority over sentence length, but only in one specific way—the President's "Power to grant Reprieves and Pardons for" federal crimes. U.S. Const. art. II, §2; *Schick* v. *Reed*, 419 U.S. 256, 266 (1974). Otherwise, in incarceration as in other areas, the Executive's role is to enforce and administer the law. "After a district court sentences a federal

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[19] See, *e.g.*, *Fletcher* v. *U.S. Att'y Gen.*, No. 09-379-KKC, 2010 WL 3938373, at *4 (E.D. Ky. Oct. 5, 2010) (noting letter soliciting views).

[20] Available at http://www.bop.gov/news/ifss.pdf. The guidance, at 3, notes that this case is pending before this Court. See also Pet. Br. 39 (citing source).

[21] This is in contrast to "recommendations" that judges may choose to make in an area that is *not* judicial in nature—such as the location of the facility in which BOP may wish to confine the prisoner. §3621(b)(4)(B).

offender, the Attorney General, through the BOP, has the responsibility for administering the sentence." *Wilson*, 503 U.S. at 335.

As jailer and administrator, BOP administers sentences as best it can, particularly in the dual-sovereign context. See Part II.B, *supra*. A new state offense committed, or discovered, after federal sentencing—one that the federal court had no knowledge of and could not address in a sentence—necessarily requires BOP to administratively determine whether federal credit is justifiable for time served on the state sentence. That BOP has no choice but to do its best *absent judicial guidance* provides no basis, of course, for mandating judicial silence in circumstances where guidance can be given. This rare necessity for BOP to make decisions about a sentence's *length* when there is no prior opportunity for judicial guidance is clearly a second-best result to be avoided whenever possible. It is not the impetus for a constitutionally questionable transfer of *exclusive* sentencing authority to BOP. Second-best mechanisms are occasionally necessary in real life, but only when the ideal is unavailable. Even though notice and an opportunity to be heard are the hallmarks of our judicial system, for instance, those requirements may be temporarily dispensed with when necessity requires. For example, Federal Rule of Civil Procedure 65(b)(1) allows a court to "issue a temporary restraining order without written or oral notice to the adverse party or its attorney" if irreparable harm would result before the adverse party could be notified and heard. That judges *can* under certain circumstances grant *ex parte* relief hardly means that it should displace traditional adversary practice—and the Rule prevents that.

B. Liberty and due-process values counsel a reading of §3584(a) that provides access to judges, not jailers, for sentencing

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). While violations of the separation of powers typically threaten liberty indirectly, the transfer of traditionally judicial sentencing authority to other branches directly infringes personal liberty and raises due-process concerns. This Court can avoid those concerns by construing §3584(a) to provide that judges, not jailers, may decide whether a sentence is consecutive or concurrent, a decision which, "[f]or many defendants, * * * is more important than a jury verdict of innocence on any single count." *Ice*, 555 U.S. at 174 (Scalia, J., dissenting).

By following the timeless methods of Anglo-American courts, "the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 551 U.S. at 351. This is how courts, but not bureaus, function. See, *e.g.*, *Irizarry* v. *United States*, 553 U.S. 708, 715-716 & n.2 (2008) (describing requirements for sentencing hearings); *Gall*, 552 U.S. at 49 (both parties entitled to argue for the proper sentence).

Between treating §3584(a) as silencing courts in cases like Setser's, versus allowing them to retain discretion to sentence, the constitutionally preferred choice is easy. The "less harsh meaning," *Ladner* v. *United States*, 358 U.S. 169, 177 (1958), is to allow sentencing to be made in open court, by an Article III judge, subject to the rigorous sentencing procedures of the Federal Rules and the Constitution, with allocution available, with counsel able to assist and argue, with due consideration of the sen-

tencing factors in §3553(a), and subject to direct appellate review.

Forcing citizens to await the judgment of a bureaucracy, without those salutary procedures, unnecessarily risks the erroneous deprivation of liberty. Indeed, the threat of consecutive sentences imposed *by sheer administrative default* is all too real. BOP admits that when judges are silent, "the default by [BOP] is to compute the federal sentence as consecutive to the state sentence regardless of which sentence was imposed first." Sadowski, *supra*, at 3. Thus, "[i]n circuits where the federal sentencing judge does not have the authority to dictate whether the federal sentence is to run concurrently or consecutively with a yet-to-be imposed sentence, the default is that the two sentences run consecutively." *Reynolds*, 603 F.3d at 1155 (W. Fletcher, J., concurring).

Agency determinations are not the same thing as judicial sentences. BOP follows the *administrative* factors of §3621(b), while Congress directed courts to the §3553(a) factors. Outcomes are riskier, as individualized administrative sentencing "could invite favoritism, disunity, and inconsistency." *Lopez* v. *Davis*, 531 U.S. 230, 244 (2001). Relief from those outcomes are also more difficult, for BOP's final denial of *nunc pro tunc* credit must be challenged under 28 U.S.C. §2241. *E.g.*, *Hunter* v. *Tamez*, 622 F.3d 427, 429 (5th Cir. 2010) (challenge to *nunc pro tunc* denial "correctly construed * * * as a §2241 habeas corpus application"). Failed §2241 actions when *nunc pro tunc* credit was denied are legion, see, *e.g.*, *Hunter*, *supra* at 428; *Reynolds*, 603 F.3d at 1145-1146; *Eccleston* v. *United States*, 390 F. App'x 62, 63-64 (3rd Cir. 2010), and cases granting relief are sparse and generally limited to simply directing BOP to reconsider. See, *e.g.*, *Barden*, 921 F.2d at 478 (ordering reconsideration after rejecting BOP's view that it could not credit state sentences when the court was silent); *Dunn* v. *Sanders*, 247 F. App'x 853,

854 (8th Cir. 2007) (ordering reconsideration because BOP did not consider proper factors). The lack of direct and searching judicial review when a non-Article III entity exercises core judicial functions is yet another constitutional problem—and yet another reason to avoid the interpretation advanced by Setser and the Government. See *Stern*, 131 S. Ct. at 2619 (rejecting bankruptcy judges' authority over Article III cases when review was not *de novo*).

The choice between the competing interpretations of §3584(a) should be easy, because it amounts to choosing between the protections afforded by an Article III court and their absence. Having one's "day in the bureaucracy" is sometimes necessary, but is uncelebrated. By contrast, a defendant's "right to his day in court," which is "basic in our system of jurisprudence," is a cherished attribute of Anglo-American law. *In re Oliver*, 333 U.S. 257, 273 (1948).

* * *

Setser and the Government offer a statutory construction devoid of textual and historical support that also raises serious constitutional questions. If Congress ever incorporates their view by enacting a law to that effect, there will be time enough for this Court to reach its constitutionality. Congress did not do that in §3584(a), and following longstanding practice, this Court should attribute to it no such views.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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